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No. _____

In The
Supreme Court of the United States

CAMPUS COMMUNICATIONS, INC.,

Petitioner,

v.

TERESA EARNHARDT, THE ESTATE OF DALE EARNHARDT, DALE EARNHARDT, JR., TAYLOR EARNHARDT, DALE EARNHARDT, INCORPORATED, COUNTY OF VOLUSIA, OFFICE OF THE MEDICAL EXAMINER, THE STATE OF FLORIDA, AND MICHAEL URIBE,

Respondents.

On Petition For A Writ Of Certiorari To The District Court Of Appeal Of Florida, Fifth District

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

In *Los Angeles Police Department v. United Reporting Publishing Corp.*, 528 U.S. 32 (1999), a majority of the Justices stated that a government agency cannot constitutionally condition access to public records on the viewpoint of the requester. The questions presented are:

1. Was a state court decision denying access to Dale Earnhardt's autopsy photographs for certain speech purposes an invalid restriction upon speech, rather than a valid restriction on access to government held information?

2. Is a statute that restricts, on the basis of viewpoint, both viewing and copying of a broad category of traditionally open government records unconstitutionally overbroad because the viewing restriction does not serve a compelling governmental interest?

PARTIES TO THE PROCEEDING & CORPORATE DISCLOSURE STATEMENT

The parties to the proceeding in the court whose judgment is sought to be reviewed are listed in the caption. Campus Communications, Inc. is a not-for-profit corporation. Therefore there is no parent or publicly held company owning 10% or more of Campus Communications, Inc.'s stock.

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JURISDICTION

The District Court of Appeal of Florida, Fifth District, entered its judgment on July 12, 2002. Campus Communications, Inc. timely invoked the discretionary jurisdiction of the Florida Supreme Court to review the judgment on July 22, 2002. The Florida Supreme Court declined to exercise its discretionary jurisdiction on July 1, 2003. (App. 47). This Court has jurisdiction to review the judgment of the Fifth District Court of Appeal pursuant to 28 U.S.C. § 1257(a). *See Am. Ry. Express Co. v. Levee*, 263 U.S. 19 (1923).

CONSTITUTIONAL PROVISIONS & STATUTES INVOLVED

U.S. Const., Amends. I & XIV; Fla. Stat. § 406.125 (2001). (App. 49).

STATEMENT OF THE CASE

Dale Earnhardt, one of the most famous racecar drivers in history, died in a crash in the final lap of the Daytona 500 on Sunday, February 18, 2001. (V9-1670-1696-¶ 75).[1]

In accordance with chapter 406, Florida Statutes, an agent of the medical examiner of Volusia County, Florida, conducted an autopsy on Earnhardt on Monday, February 19, 2001. (V9-1670-1696-¶ 92). Section 119.07(1)(a), Florida Statutes, required that the autopsy report and photographs taken during the autopsy be made available to the public for inspection and copying.[2]

Teresa Earnhardt commenced this action on Thursday, February 22, 2001, seeking a temporary and permanent injunction to stop Thomas Beaver, the medical examiner for Volusia County, Florida, from making photographs of the autopsy available to the public and the

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[1] Citations by the notation (V___-___-¶ ___) are to the record below by volume, page range, and, paragraph number. Citations by the notation (T___-___) are to the trial transcript volume and page.

[2] Florida first enacted a Public Records Law in 1909. Ch. 5942, Laws of Florida (1909). No general privacy exemption nor any general autopsy record exemption has ever been enacted. The Legislature exempted autopsy records of some county medical examiners by special law, *see, e.g.*, s. 5, Ch. 61-2640, Laws of Florida, (Palm Beach County), but in 1970, the Legislature enacted s. 11, Ch. 70-232, Laws of Florida (codified as chapter 406, Florida Statutes), to govern medical examiners generally. It superseded special acts without including any exemptions for records created by medical examiners. *See Palm Beach Newspapers, Inc. v. Terlizzesse*, 6 Fla. Supp. 2d 8, 10 (Fla. 15th Cir. 1984) (ordering production of autopsy records relating to David Kennedy, son of the late Sen. Robert F. Kennedy), *aff'd sub nom. Bludworth v. Palm Beach Newspapers, Inc.*, 476 So. 2d 775 (Fla. 4th DCA 1985).

press. (V2-290-301). In support of her request for the temporary injunction, she asserted that disclosure of the autopsy photographs would violate "the right to privacy under the United States Constitution." (V3-487-488). The trial court entered an *ex parte* temporary injunction on the date that the lawsuit was filed, directing the medical examiner not to make the Earnhardt autopsy photographs available to the public. (V2-302-304).

After other members of the Earnhardt family and Dale Earnhardt, Inc. (referred to collectively with Teresa Earnhardt as "the Earnhardts") appeared to support sealing the records (V2-347-49), and Sentinel Communications Company, publisher of the *Orlando Sentinel*, and Michael Uribe, operator of a website, appeared to oppose sealing the records (V2-315-317, V3-550-556, V4-747), the trial court referred the matter to mediation. (V4-750-51).

As the mediation was coming to a conclusion on March 16, 2001, Campus Communications, Inc., publisher of *The Independent Florida Alligator*, a newspaper in Gainesville, Florida, that had not participated in the mediation, moved to intervene to seek dissolution of the temporary injunction and dismissal of or summary judgment against the complaint. The motion alleged that Campus Communications had asked to inspect and copy the autopsy photographs pursuant to chapter 119, Florida Statutes, the Florida Public Records Law, and that the medical examiner had refused the request due to entry of the temporary injunction. (V5-771-803). The motion argued that the privacy right that the Earnhardts claimed under the federal Constitution could not block operation of the Florida Public Records Law. (V5-783-805). It also argued that any limitation on access based on the viewpoint of the

requester would "violate the First Amendment rights of the requester." (V5-793).

On that same day, March 16, 2001, the parties who had participated in the settlement – the *Sentinel*, additional intervening members of the press (V4-755-758), the medical examiner, and the Earnhardts – announced that they had reached an agreement whereby the mediator would appoint an independent expert to review the autopsy photographs and audiotapes and would report his findings. (V5-766-769). The agreement further provided that the photographs would be permanently sealed after the appointed expert had examined them. (V5-766-769). The circuit court approved the settlement on March 19, 2001. (V5-770).

Ten days later, on March 29, 2001, the Florida Legislature amended the Public Records Law through enactment of Chapter 2001-1, Law of Florida (codified as section 406.135, Florida Statutes), creating a general retroactive exemption to the Florida Public Records Law for autopsy photographs, videotapes, and audiotapes. The new law also created a mechanism by which anyone could apply to a state circuit court for access. In order to gain access under this mechanism, the law placed on the applicant the burden of demonstrating that he or she had "good cause" for such access.[3] The law did not provide any specific or objective definition of "good cause," but instead mandated judicial consideration of "whether such disclosure is necessary for the public evaluation of governmental performance; the seriousness of the intrusion into the

[3] Fla. Stat. § 406.135(2)(a) (2001).

family's right to privacy and whether such disclosure is the least intrusive means available; and the availability of similar information in other public records, regardless of form."[4]

On April 3, 2001, Campus Communications filed a supplemental memorandum (V5-890-933) and supplemental materials in support of its motion to intervene showing that autopsy photographs historically have played a critical role in press reports about murders, medical malpractice, prison deaths and numerous other public controversies. (V6-962-1162 & V7-1163-1311). In some instances, the press had found that medical examiners themselves had made serious errors in determining the cause of death or had engaged in wrongdoing or questionable practices. (V7-1163-1311 & Exs. 5-7, 9-10, 13, 15-17, 19, 22-51). The supplemental materials also demonstrated that the cause of Earnhardt's death had become a public controversy and that the photographs sought were relevant to that controversy. (V7-1163-1311 & Exs. 2, 4 & 8).

The supplemental memorandum argued that "Chapter 2001-1 is . . . invalid and unconstitutional under the First Amendment of the United States Constitution, both on its face and as applied to Campus Communications . . . in at least three respects. First, the statute purports to involve the judiciary in the editorial process. Second, the statute discriminates among speakers based upon the content of their speech. Third, the statute interferes with newsgathering." (V7-927). The memorandum further asserted that "Restrictions on access to governmental

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[4] *Id.*

information, particularly information that has been traditionally open to the public, may not be imposed in the absence of compelling governmental interests." (V7-929).

On April 5, 2001, the circuit court granted Campus Communications' motion to intervene. (V7-1334). On April 16, 2001, Campus Communications filed a cross-claim against the medical examiner seeking an order under the Public Records Law requiring him to allow inspection and copying of the Earnhardt autopsy photographs. (V8-1359-1375). The State of Florida intervened to defend the constitutionality of Chapter 2001-1. (V8-1376-1379).

The medical examiner answered Campus Communications' complaint on May 2, 2001, admitting that the records sought by Campus Communications were public records and that they were not exempt from the disclosure requirements of that law at the time they had been requested, but asserting that he had been prevented from allowing access to the records by the temporary injunction that had been entered by the circuit court. (V8-1415-1417). The State answered the complaint on May 9, 2001, asserting that Chapter 2001-1 was constitutional. (V8-1452-1454).

The Court set the case for a bench trial to begin on June 11, 2001. Campus Communications submitted a trial memorandum that briefed the Court regarding the First Amendment and Equal Protection problems created by Chapter 2001-1. (V9-1719-1724).

In opening arguments, counsel for Campus Communications asserted:

> [Chapter 2001-1] abridges the First Amendment . . . in that it unjustifiably intrudes on the editorial

process of those who wish to have access to exempted records. And we know that because it has imposed this highly discretionary standard on those who may have access to the records. It has said, come in, show us that you have good cause, and if you do, you can have access to the records.

* * *

If the National [E]nquirer comes in, if the Globe comes in, if the New York Times comes in, if the Los Angeles Times comes in, . . . or if the Independent Florida Alligator comes in, there is nothing within the Statutes that says to the Judge you may not discriminate on the basis of the content of those particular publications or what they plan to do with the photographs.

Mr. Uribe [an intervenor] comes into court and says, I have good cause because I would like to use those photographs to demonstrate that racing is a hazardous activity and it results in deaths and I think people should be able to see the consequences of these deaths. How does the Court evaluate that type of claim? It evaluates it on the basis of the use to which he will put the photographs. The Court is not required to disclose those photographs simply upon a finding that disclosure of the photographs would inflict no harm. The Legislature might have done that, might have said to courts, if someone comes in, asks for the photographs and there is no showing that the release of the photographs would cause harm . . . then, Judge, you must release it. That would be a very different type of exemption.

* * *

> The Statute invites judges on its face to condition access on how those requesting the information are exercising a fundamental right, their First Amendment rights. What are you going to use the photograph for? That is prohibited. That type of statute is unconstitutional on its face.

(T1-30-34).

During the first day of the trial, the Court heard testimony from Thomas Beaver, the Volusia County medical examiner. Dr. Beaver testified that "it's important that we, as a society, know why people die, because . . . it helps us to identify risks to the society as a whole." (T2-200). He testified that historically his office had treated autopsy reports, including autopsy photographs, as public records and had released the reports and photographs upon the request of any member of the public for inspection and copying. (T2-202 & V9-1670-1696-¶ 35). He testified that he did not follow that practice in this case solely because of the temporary injunction entered by the circuit court. (T2-223).

According to Beaver, prior to this lawsuit, when a member of the public had asked to inspect or copy the autopsy records relating to a specific deceased person, that member of the public would be allowed to inspect and copy all autopsy records relating to the deceased person, including autopsy photographs, videotapes, and audiotapes. (V9-1670-1696-¶ 38). More than 50 members of the public had inspected and copied autopsy records maintained by Beaver within the 12-month period preceding February 22, 2001. (V9-1670-1696-¶¶ 39 & 40). Individuals who had copied autopsy photographs had not used them for harmful purposes. (V9-1670-1696-¶ 43).

Individuals who previously had asked for and obtained access to autopsy photographs included reporters, privately-employed medical doctors, privately-employed pathologists, privately-employed investigators, educators, medical researchers, sociologists, and acquaintances and relatives of the deceased (V9-1670-1696-¶ 45), and these individuals sometimes expressed disagreement with the conclusions of the medical examiner regarding the cause of death after they reviewed the photographs. (V9-1670-1696-¶ 48). Beaver himself had worked as a consultant in civil and criminal litigation and found it essential to review any autopsy photographs for that purpose. "[T]he first thing I ask the attorney for are the pictures," he testified. (T2-235).

Beaver admitted that in the week before Earnhardt died, the *Orlando Sentinel* had published a series of investigative reports highly critical of the National Association for Stock Car Auto Racing, Inc. ("NASCAR"), sponsor of the Daytona 500, for failing to require head and neck restraint systems that could prevent basilar skull injuries in high speed crashes. The articles reported that three NASCAR drivers had died in races in the previous nine months of head and neck injuries and that other racing organizations had required the use of head and neck restraint systems to prevent such injuries.[5]

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[5] *See* Ed Hinton, *NASCAR Idles While Drivers Die*, Orlando Sentinel (Feb. 11, 2001) Ed Hinton, *Safety Slow To Arrive Despite Race Carnage*, Orlando Sentinel (Feb. 13, 2001); Ed Hinton, *NASCAR Drivers Want Own Medical Staff*, Orlando Sentinel (Feb. 13, 2001). (V9-1670-1696-¶¶ 68-70 & exhibits).

At the conclusion of the first day of the trial, the circuit court announced that it had found "that the legislative enactment of Chapter 2001-1 was a valid and constitutional exercise of legislative authority" under state constitutional provisions. (T2-281). The court ignored the arguments that the statute violated the First and Fourteenth Amendments. The court then invited Campus Communications to attempt to show that it had "good cause" for obtaining access to the photographs pursuant to the standards set forth in Chapter 2001-1. (T2-281).

In response to that invitation, Campus Communications chose not to offer any testimony from its reporters or editors. Instead, it offered testimony of Daytona Beach Police Department Sgt. Thomas Youngman, a police photographer (T3-323-351), Dr. Steve Bohannon (T3-352-399), Teresa Earnhardt (T4-406-482), and numerous newspaper articles. Collectively, the testimony and articles showed that the *Orlando Sentinel* had sharply criticized NASCAR in the week prior to Earnhardt's death for not requiring head and neck restraint systems for all drivers; that Bohannon, a NASCAR-employed doctor, announced that Earnhardt's fatal injuries were the type of injuries a head and neck restraint could have prevented; that the Volusia County medical examiner gave Bohannon access to the Earnhardt autopsy photographs shortly before entry of the temporary injunction; that after entry of the temporary injunction NASCAR, supported by Bohannon, publicly claimed that Earnhardt's death had been caused by seatbelt failure, rather than the lack of a head and neck restraint system; that the seatbelt manufacturer publicly claimed Earnhardt's seatbelt had not broken; and that an emergency medical technician who removed Earnhardt

from his car had publicly asserted that Earnhardt's seatbelt was intact after the crash.

Campus Communications urged the Court at least to make the photographs available for inspection so that it could attempt to determine for itself whether Earnhardt had died, as NASCAR contended, because his seatbelt broke or, as others contended, because NASCAR had failed to require drivers to wear head and neck restraint systems. (T5-556-575).

At the conclusion of the arguments, the trial judge orally announced that neither Campus Communications nor Uribe had shown good cause. The trial judge found that any bearing that the photographs might have on NASCAR's safety requirements could not constitute good cause for release because "that's a private matter that does not involve the Government at all." (T5-737). The written order (App. 28) was explicitly based on the viewpoint of the interveners and the content of Uribe's prior publications. "The intervener, Mr. Uribe," the order observed, "has already published autopsy photographs of Neil Bonnett and Rodney Orr, two racecar drivers who died in accidents at the Daytona International Speedway, on his web site, *websitecity.com*." (App. 33-¶ 15). The trial judge also noted:

> The hypotheses relating to NASCAR racing safety raised by the interveners do not meaningfully implicate governmental accountability. While there may be a number of *private* interests implicated, the suggestion of a controversy within NASCAR by the interveners certainly does not implicate a *governmental* interest. Those issues offered for the consideration of the court were thinly veiled excuses to gain access to the court either for the purpose of arguing the

> constitutionality of the statute or for making a profit at the expense of this family.

(App. 34-¶ 18). In both his oral rulings and written order, the trial judge ignored all the arguments that the First and Fourteenth Amendments prohibit denying access to public records on the basis of the requester's viewpoint.

After denial of a motion for new trial (App. 45), Campus Communications timely appealed the final judgment to the Fifth District Court of Appeal. (V16-2493-2494). On appeal, Campus Communications attacked the trial court's order as a viewpoint-based denial of access unsupported by compelling governmental interests. Specifically, it argued:

> Even if the state has no constitutional obligation to grant access, *see L.A. Police Dep't v. United Reporting Pub'g Corp.*, 120 S. Ct. 483 (1999), once it decides to grant access, it may not consistent with the First Amendment and Equal Protection Clause deny access to some on the basis of viewpoint. *Cf. Legal Servs. Corp. v. Velazquez*, 121 S. Ct. 1043, 1050 (2001) (government cannot condition subsidies on basis of viewpoint); *Good News Club v. Milford Cent. School*, 121 S. Ct. 2093 (2001) (exclusion of Christian children's club from meeting after hours was unconstitutional viewpoint discrimination); *National Endowment for the Arts v. Finley*, 118 S. Ct. 2168 (1998) (NEA may not "leverage its power to award subsidies on the basis of subjective criteria into a penalty on disfavored viewpoints"); *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819 (1995) (state university may not disburse student activity fees on viewpoint-based terms); *Anderson v. Cryovac*, 805 F.2d 1, 9 (1st Cir. 1986) ("danger in granting favorable [access]

> to certain members of the media is obvious: it allows the government to influence the type of substantive media coverage that public events will receive"). The court in the instant case expressly grounded its decision denying access, in part, on the viewpoint of the requesters that autopsy photographs under some circumstances should be published. (R. 2469-81 at 5-6) (referencing past and future publications of the requesters as justification for denying access). Both the order and Chapter 2001-1 abridge the First Amendment and deny equal protection by denying on the basis of viewpoint access to records made available to others.

(Appellant's Brief at 25 n.13).

The Fifth District Court of Appeal, like the trial court, ignored this argument, and upheld the trial court's judgment denying access to the records. *Campus Communications, Inc.*, 821 So. 2d 388 (App. 1). Also like the trial court, the Court of Appeal based its decision on Campus Communications' viewpoint that information contained in the photographs (but not necessarily the photographs themselves) should be published in the event that they showed that Earnhardt had died due to NASCAR's failure to require its drivers to use a head and neck restraint system. Specifically, the Court of Appeal found "that the safety requirements of NASCAR, a private entity, do not implicate the public's interest in evaluating governmental performance sufficient to release the photographs." 821 So. 2d at 402 (App. 25). The Court made no determination that this type of viewpoint discrimination served a compelling or even a substantial governmental interest and no determination that the denial of access had been narrowly tailored to serve such an interest. It certified to the Florida

Supreme Court, however, that the case had raised the broad question "IS SECTION 406.134 CONSTITUTIONAL?" *Id.* at 403 (App. 27). The Florida Supreme Court requested and received briefs on that question, but then decided not to exercise its discretion to review the decision. (App. 47).

REASONS FOR GRANTING THE WRIT

I.

The State Court Decision Approves Restricting Public Record Access in Derogation of this Court's Decisions

The decision of the District Court of Appeal applied Chapter 2001 in violation of the First and Fourteenth Amendments.

A. The Order Unconstitutionally Denied Access on the Basis of Viewpoint & Disclosure of Editorial Process

In *Los Angeles Police Department v. United Reporting Publishing Corp.*,[6] a majority of the Justices made clear that a state cannot constitutionally condition access to its records on the viewpoint of the requester. Justice Ginsburg, J., joined by Justices O'Connor, Souter and Breyer wrote: "California could not, for example, release address information only to those whose political views were in

[6] 528 U.S. 32 (1999).

line with the party in power."[7] Justice Stevens, joined by Justice Kennedy, observed: "As Justice GINSBURG points out, if the State identified the disfavored persons based on their viewpoint, or political affiliation, for example, the discrimination would clearly be invalid."[8] Justices Scalia and Thomas also acknowledged that even though a statute that merely denied access to records would impose no restrictions on speech, "it is an entirely different question whether a restriction upon access that *allows* access to the press (which in effect makes the information part of the public domain), but at the same time *denies* access to persons who wish to use the information for certain speech purposes, is in reality a restriction upon speech rather than upon access to government information."[9]

The Court grounded these views on the "unconstitutional-conditions" doctrine[10] which holds that the government may not condition the grant of a benefit on the beneficiary's surrendering a constitutional right, even if the government may withhold that benefit altogether.[11] The government cannot "leverage its power to award

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[7] *Id.* at 43 (Ginsburg, J., concurring, joined by O'Connor, Souter & Breyer, JJ.).

[8] *Id.* at 45-46 (Stevens, J., dissenting, joined by Justice Kennedy).

[9] *Id.* at 41 (Scalia, J., concurring, joined by Thomas, J.).

[10] *See generally* Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 Harv. L. Rev. 1413, 1415 (1989).

[11] *See, e.g., L.A. Police Dep't v. United Reporting Pub'g Corp.*, 528 U.S. 32, 43 (Ginsburg, J.) (citing *Board of County Commissioners v. Umbehr*, 518 U.S. 668 (1996)) (First Amendment prohibited firing of county contractor based on his expressed political views).

subsidies on the basis of subjective criteria into a penalty on disfavored viewpoints."[12]

Chapter 2001-1, Laws of Florida, explicitly allowed trial judges to do just that when it simultaneously exempted autopsy photographs from disclosure under the Public Records Law and allowed access to those who could show "good cause" for allowing access. The Legislature did not define "good cause." Instead, it provided a list of factors for courts to consider in deciding whether good cause had been shown. The courts below interpreted the statute as requiring them to condition access on the purpose for which Campus Communications sought access. They weighed the fact that Campus Communications had sought access primarily for the purpose of questioning the accuracy of NASCAR's public statements and found that not to be good cause.

The courts noted that the statute required them to consider whether disclosure was sought to evaluate

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[12] *Nat'l Endowment of the Arts v. Finley*, 524 U.S. 569, 587 (1998) (citations omitted); *see also Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819 (1995) (state university may not disburse student activity fees on viewpoint-based terms); *Lamb's Chapel v. Center Morishes Union Free Sch. Dist.*, 508 U.S. 384 (1993) (after-hours access to public school property cannot be withheld on the basis of viewpoint); *Ark. Writers' Project, Inc. v. Ragland*, 481 U.S. 221 (1987) (different taxation of newspapers prohibited); *Pac. Gas & Elec. Co. v. Pub. Util. Comm'n*, 475 U.S. 1 (1986) (government-required access to public utility's billing envelopes must not be viewpoint based). A law granting a judge standardless discretion to impose conditions on the release of public records is unconstitutional. *Cf. Shuttlesworth v. City of Birmingham*, 394 U.S. 147, 150-51 (1969) ("a law subjecting the exercise of First Amendment freedoms to the prior restraint of a license, without narrow, and definite standards to guide the licensing authority, is unconstitutional").

governmental performance and concluded that Campus Communications' stated purpose in seeking access – to evaluate the accuracy of the autopsy report and law enforcement investigations of the accident – was not its true purpose. (App. 24-26 & 41). The trial court found that access had been sought "either for the purpose of arguing the constitutionality of the statute or for making a profit at the expense of this family" and concluded that neither of these purposes could justify granting access to the photographs. (App. 35). The record is clear that the courts below denied any access to the photographs because they found that Campus Communications' purpose for seeking access – its viewpoint – could not be characterized as "good cause."[13]

Neither the Earnhardts nor the State attempted to argue that denying access on the basis of viewpoint would serve any compelling governmental interest or that such a denial would be narrowly tailored to serve any such interest. They did argue and the courts found that allowing access to the photographs would harm the Earnhardts'

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[13] The courts also found that the photographs would not provide any information about the cause of death beyond that in the autopsy report. Whether that is correct obviously can be determined only from a review of the photographs. The Florida Supreme Court, consistent with Dr. Beaver's testimony that "the first thing I ask the attorney for are the pictures," repeatedly has recognized that autopsy photographs have unique evidentiary value that cannot be supplanted by written reports or testimony. *See, e.g., Mansfield v. State*, 758 So. 2d 636, 648 (Fla. 2000) (holding trial court did not abuse discretion in admitting photographs depicting mutilation of victim's genitalia where relevant to medical examiner's determination of manner of victim's death); *Straight v. State*, 397 So. 2d 903 (Fla. 1981) (affirming conviction where gruesome photographs were admitted over defendant's objection that he would stipulate to the facts).

asserted privacy rights and in doing so both the trial and appellate courts rejected the suggestion of Campus Communications that its journalistic purposes could be served and the Earnhardts' privacy could be protected simply by prohibiting copying of the photographs while still allowing viewing at the medical examiner's office. (App. 25 & 35-¶ 20). That solution would have preserved the practical obscurity that autopsy photographs have had for decades, but both courts noted that Mrs. Earnhardt testified that she would be disturbed simply by knowing that others could view the photographs. The courts held that even this type of harm outweighed the disfavored purpose of questioning the public statements of NASCAR, a private entity, regarding the cause of Earnhardt's death. No court, however, has held that the government has a compelling interest in preventing this type of minimal disturbance generally and there clearly was no compelling interest in doing so here. Dale Earnhardt was one of the most public of celebrities. He chose to participate in and he and his family benefited from a sport that regularly produces fatalities. His death occurred before a crowd of more than 200,000 and a national television audience.[14] Extensive details concerning the cause of Earnhardt's death already had been made public through release of the autopsy report. Family "privacy interests" in blocking press inspection of autopsy photographs are certainly at their nadir here and no state or federal disclosural privacy right

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[14] *See* Mike Fish, *End of an Era – Earnhardt's Death High Price for Fans' Excitement*, http://sportsillustrated.cnn.com/motorsports/2001/daytona500/news/2001/02/18/nascar_earnhardt_dies/ (posted Feb. 18, 2001).

exists.[15] The order therefore applied Chapter 2001-1 to deny access in violation of the First and Fourteenth Amendments.[16]

B. The Order Denied Access to Records That Had Been Public at the Time of the Request

In *United States v. American Library Association*, 123 S. Ct. 2297, 2310 (2003), four members of this Court agreed that a federal statute requiring public libraries to filter Internet materials to protect young library users from obscenity and child pornography must be subjected to strict or intermediate scrutiny.[17] Four members of the

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[15] *See Whalen v. Roe*, 429 U.S. 589 (1977) (rejecting claim that rights would be violated by a centralized computer filing system for medical records maintained by government agency); *Nixon v. Adm'r of Gen. Servs.*, 433 U.S. 425 (1977) (archivists' review of tapes made during Nixon presidency to sort out personal matter would not violate Nixon's claimed privacy right); *Paul v. Davis*, 424 U.S. 693 (1976) (officials did not violate claimed privacy right by distributing flyers identifying plaintiff as shoplifter); Art. I, § 23, Fla. Const. (right of privacy "shall not be construed to limit the public's right of access to public records and meetings as provided by law"); R. D. Woodson & Ricki L. Tannen, *Federal Constitutional Privacy & The Florida Public Records Law: Resolving the Conflict*, 33 U. Fla. L. Rev. 313, 337 (1980) ("privacy amendment" may not be used "to impede public access to public information") (footnotes omitted).

[16] The majority in *United Reporting*, 528 U.S. at 40, declined to address the petitioner's as applied attack because it "did not attempt to qualify." Campus Communications, by contrast, applied for access in accordance with the procedures of the statute.

[17] *See United States v. Am. Library Ass'n*, 123 S. Ct. 2297, 2310 (2003) (Breyer, J., concurring) (restriction on access to materials in public library "calls for heightened, but not 'strict,' scrutiny"); *id.* at 2312, 2316 (Stevens, J., dissenting) ("An abridgement of speech by means of a threatened denial of benefits can be just as pernicious as an abridgment by means of a threatened penalty"; *id.* at 2318, 2324

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Court expressed the opposite view that such decisions should be subject to rational basis analysis only.[18] Justice Kennedy had no need to decide the appropriate level of scrutiny because he found that the statute at issue served a compelling governmental interest and that the plaintiffs had not shown that imposition of the filter would deny adults access to protected materials, so the statute would survive strict scrutiny analysis.[19] "If some libraries do not have the capacity to unblock specific Web sites or to disable the filter," Justice Kennedy added, "or if it is shown that an adult user's election to view constitutionally protected Internet materials is burdened in some other substantial way, that would be the subject for an as-applied challenge, not the facial challenge made in this case."[20]

This as-applied challenge to the order denying access to public records presents an opportunity to determine the appropriate level of scrutiny applicable to governmental action that removed information from a library of a different type – the library of open governmental records – after the records were requested. Petitioner submits that strict scrutiny is appropriate and that the decision to remove the Earnhardt photographs from public view cannot survive

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(Souter, J., dissenting, joined by Ginsberg, J.) (removal of material already on the shelves when scarcity of resources is not an issue is subject to "conventional strict scrutiny").

[18] *Id.* at 2298 (Rehnquist, C.J., announcing the judgment of the Court, joined by O'Connor, Scalia & Thomas, JJ.).

[19] *Id.* at 2309 (Kennedy, J.). *See also Bd. of Ed., Island Trees Union Free School Dist. No. 26 v. Pico*, 457 U. S. 853, 870-71 (1982) (plurality opinion).

[20] *Am. Library Ass'n*, 123 S. Ct. at 2310 (Kennedy, J., concurring).

such scrutiny because there was no compelling governmental interest in doing so – or at least no compelling interest in prohibiting the mere *inspection* of them. The statute served only to protect the Earnhardt family from knowing that others would see the photographs while it blocked journalists from obtaining information that could have saved at least one life.[21]

II.

The State Court Decision Approves a Facially Invalid Statute That is Being Championed as a Model for Restricting Access to Public Records

Review also should be granted because Chapter 2001-1 has become a model for states to restrict access to public records on the basis of viewpoint and it has been cited by both Mrs. Earnhardt and the Solicitor General of the United States to this Court in *Favish v. Office of the Independent Counsel*, No. 02-954, *cert. granted*, 123 S. Ct. 1928 (May 5, 2003), as a model for interpreting the federal Freedom of Information Act. Chapter 2001-1 is facially invalid by virtue of (A) its denial of access to journalists

[21] Four months after the trial court order, Blaise Alexander, a driver for the Automobile Racing Club of America, which is closely allied to NASCAR, died of a basilar skull injury in a crash on Oct. 4, 2001, at Lowe's Motor Speedway in Concord, North Carolina, making him the sixth stockcar driver to die of this type of injury in 17 months. Two weeks thereafter, NASCAR ordered all of its drivers to begin using head and neck restraint systems. *See* Ed Hinton, *NASCAR Tells Drivers To Use Head-And-Neck Devices*, Orlando Sentinel, http://www.orlandosentinel.com/news/local/orl-asec-nascar101801,0,7723996.story?coll=orl-home-headlines (posted Oct. 18, 2001).

engaged in confidential investigations of government wrongdoing, and (B) its closure of traditionally open public records on the basis of content without sufficient justification.

The Court has granted a writ of certiorari to review *Favish v. Office of the Independent Counsel*, 37 Fed. Appx. 863, Nos. 01-55487/55788/55789, 2002 WL 1269348 (9th Cir. June 6, 2002), *cert. granted*, 123 S. Ct. 1928 (May 5, 2003) (No. 02-954), a decision that interprets 5 U.S.C. § 552(b)(7)(C), as not prohibiting disclosure of post-mortem photographs of Vince Foster. As amicus curiae in support of the petitioner in *Favish*, Mrs. Earnhardt points out that in the two years since her husband's death, she "has become a national spokeswoman for families like hers: families who lose a loved one through a tragedy that triggers the involvement of some governmental agency" and that her "particular focus has been on the inspection, copying, and republication, by print and electronic press and on the internet, of autopsy photographs."[22] Her brief contends that "[m]ost states now restrict public access to autopsy photographs,"[23] and it shows that her success in litigation in Florida has tempted other states to condition access to public records on the ability of the requester to demonstrate "good cause."[24] Mrs. Earnhardt observes in

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[22] Amicus Brief of Teresa Earnhardt at 1-2, *Favish*, 123 S. Ct. 1928 (hereinafter "Earnhardt Amicus Brief in *Favish*").

[23] *See* App. to Earnhardt Amicus Brief in *Favish* (describing autopsy record access laws in many states).

[24] *See, e.g.*, N.C. House Bill 645 (described in Earnhardt's Appendix as allowing access on the basis of "good cause"); NBC17.com, *Peterson's Sister Wants No Autopsy Photo Restrictions*, http://www.nbc17.com/print/2023951/detail.html?use=print (posted Mar. 6, 2003) (describing

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Favish that "Even courts are increasingly concerned about the amount of sensitive information about individuals filed with courts and then widely publicly disseminated," citing recent work by the U.S. Judicial Conference and the Florida Supreme Court.[25] These arguments underscore the importance of granting a writ of certiorari to guide legislators and judges who are evaluating how to regulate access to autopsy photographs and many other public records in the Internet era.[26] If the decision of the Fifth District Court of Appeal is left unreviewed, it threatens to inspire widespread imposition of unconstitutional restrictions on access to public records.

A. The Statute Conditions Access on the Content of Prior Publication, Viewpoint & Disclosure of Editorial Process

"[W]hen statutes regulate or proscribe speech . . . the transcendent value to all society of constitutionally protected expression is deemed to justify allowing 'attacks on

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North Carolina Legislature's consideration of legislation similar to the Florida law); Housedems.com, *House Unaimously Approves Gleason's Autopsy Photo Release Ban*, http://www.housedems.com/preview.cfm?repID=109&articleID=2176 (released Apr. 14, 2003) (describing Michigan House vote).

[25] Earnhardt Amicus Brief in *Favish* at 15.

[26] The debate is even more widespread than Mrs. Earnhardt shows. *See, e.g.*, Center for Democracy & Technology, *A Quiet Revolution in the Courts: Electronic Access to State Court Records – A CDT Survey of State Activity and Comments on Privacy, Cost, Equity and Accountability*, http://www.cdt.org/publications/020821courtrecords.shtml (visited Sept. 19, 2003); Susan Larson, *Public Access to Electronic Court Records & Competing Privacy Interests*, http://www.judgelink.org/Insights/2001/E-Records/ (visited Sept. 19, 2003).

overly broad statutes with no requirement that the person making the attack demonstrate that his own conduct could not be regulated by a statute drawn with requisite narrow specificity.'"[27] "This is deemed necessary because persons whose expression is constitutionally protected may well refrain from exercising their right for fear of criminal sanctions provided by a statute susceptible of application to protected expression."[28] The Court also has allowed facial challenges to statutes that could be used to condition subsidies on viewpoint.[29]

By placing a burden on the requester to show "good cause," the statute here allows courts to deny access on the basis of prior publication of the requester, the viewpoint of the requester, the unwillingness of the requester to expose the nature of its investigation of the government, or findings that are based entirely on one-sided arguments of government officials or others who themselves have access to the records but wish to keep the public records secret.

The trial judge below considered that Michael Uribe previously had published autopsy photographs on his Internet website.[30] As discussed above, he also explicitly

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[27] *Gooding v. Wilson*, 405 U.S. 518, 520-21 (1972) (quoting *Dombrowski v. Pfister*, 380 U.S. 479, 486 (1965).

[28] *Gooding*, 405 U.S. at 520-21.

[29] *See, e.g. Finley*, 524 U.S. 569 (entertaining a facial challenge to a public funding scheme); *Suitum v. Tahoe Reg'l Planning Agency*, 520 U.S. 725 (1997) (entertaining a landowner's facial challenge to a local redevelopment plan); *Anderson v. Edwards*, 514 U.S. 143 (1995) (entertaining facial challenge to state restructuring of welfare benefits).

[30] It is "without question" that the government may not deny a benefit as a penalty for "a person's constitutionally protected past

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interpreted the statute as allowing consideration of the purpose for which the photographs had been requested. The appellate court approved both inquiries and this resulted in the unconstitutional denial of access on the basis of the requesters' viewpoint. While some such denials can be reviewed and corrected, as here, on a case-by-case basis, in many instances journalists cannot disclose the nature of their investigations or the sources that have given them good cause for wanting to inspect public records without compromising their investigations.[31] They will lose access to records that others are permitted to inspect and copy solely because they are engaged in protected newsgathering activities. Facial invalidation of such a statute is appropriate because it imposes an unconstitutional burden on the exercise of First Amendment rights[32] and unconstitutionally distorts the proper functioning of

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speech." *Ackerley Communications v. City of Somerville*, 878 F.2d 513, 519 (1st Cir. 1989) (citing *Speiser v. Randall*, 357 U.S. 513, 518 (1958)).

[31] *See, e.g.*, American Society of Newspaper Editors, *Statement of Principles*, Article VI, http://www.asne.org/kiosk/archive/principl.htm ("Pledges of confidentiality to news sources must be honored at all costs, and therefore should not be given lightly") (visited Sept. 19, 2003); Society of American Business Editors & Writers, *Code of Ethics* ¶ 5, http://www.sabew.org/sabewweb.nsf/LinksView/0A4808805267F1C486256BF2007FCF73 (visited Sept. 19, 2003) ("Make every effort to insure the confidentiality of information held for publication to keep such information from finding its way to those who might use it for gain before it becomes available to the public").

[32] *Cf. Watchtower Bible & Tract Soc'y v. Village of Stratton*, 536 U.S. 150, 167 (2002) (imposition of registration requirement on door-to-door canvassers is facially invalid because "there are a significant number of persons whose religious scruples will prevent them from applying for such a license").

the Public Records Law by conditioning access on disclosure of the editorial process.[33]

In *Favish*, Mrs. Earnhardt asserts that Chapter 2001-1, Laws of Florida, "prohibits the inspection and copying of [autopsy] photographs absent a showing of good cause [and that t]he issues involved in balancing these rights are similar to those involving Exemption 7(C)."[34] In fact, Exemption 7(C) is highly distinct from Chapter 2001-1, Laws of Florida, and provides a good example of legislation that does not allow consideration of the content of the requester's point of view and that is therefore constitutional. In *United States Department of Justice v. Reporters Committee for Freedom of the Press*, 489 U.S. 749, 771 (1989), the Court explicitly held:

> whether an invasion of privacy is *warranted* cannot turn on the purposes for which the request for information is made. Except for cases in which the objection to disclosure is based on a claim of privilege and the person requesting disclosure is the party protected by the privilege, the identity of the requesting party has no bearing on the merits of his or her FOIA request.

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[33] *Cf. Legal Servs. Corp. v. Velazquez*, 531 U. S. 533, 543 (2001) (when "the Government seeks to use an existing medium of expression and to control it, in a class of cases, in ways which distort its usual functioning," the distorting restriction must be struck down under the First Amendment); *see also Am. Library Ass'n*, 123 S. Ct. at 2317 (2003) (Stevens, J., dissenting) ("requiring the filtering software on all Internet-accessible computers distorts that medium").

[34] Earnhardt Amicus Brief in *Favish* at 2-3, *Favish*, 123 S. Ct. 1928 (footnote omitted); *see also* Appellant's Brief at 24-25, *Favish*, 123 S. Ct. 1928.

The Court further held that requests for records under the FOIA must be resolved "without regard to individual circumstances." *Id.* at 780. Consistently, Mrs. Earnhardt argues in *Favish* that Exemption 7(C) should not be interpreted as allowing the purpose of the request to be considered. She asserts that the "Court would be justified in considering [Exemption 7(C)] a categorical exemption from the FOIA for all post-mortem photographs."[35] While petitioner does not agree that Exemption 7(C) categorically applies to all post-mortem photographs, it does agree that Exemption 7(C) is categorical in that it does not require a determination of whether the requester has shown "good cause." If interpreted otherwise, Exemption 7(C) could be used to distort the usual operation of FOIA by offering government records as a prize to those who conform their views and use of records to the government's preferences and that would render Exemption 7(C) vulnerable to the same constitutional attack made on Chapter 2001-1 here.

It is critical for this Court to make clear in this case, as the majority did in *United Reporting* and as Congress did when it enacted FOIA, that control over access to public records may not be leveraged to coerce or to suppress a particular viewpoint.[36]

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[35] Earnhardt Amicus Brief in *Favish* at 29.

[36] That portion of Chapter 2001-1 that provides judges discretion to discriminate based on improper factors is now codified as Fla. Stat. § 406.135(2)(a) (2002). Invalidation of that subsection alone would leave the exemption created by Fla. Stat. § 406.135(1) (2002) in place, but chapter 2001-1 does not contain a severability clause and it cannot be "'said that the Legislature would have passed the one without the other.'" *Women's Emergency Network v. Bush*, 323 F.3d 937, 949 (11th

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B. The Exemption Removes Traditionally Open Records from Public View Without Sufficient Justification

After the Solicitor General's citation and discussion of the instant case in his brief for the petitioner in *Favish*, he makes the assertion that "there is no broadly recognized tradition in the United States of public access to autopsy or crime-scene photographs or similar depictions of individuals immediately prior to or in the throes of their death." Petitioner's Brief in *Favish* at 26. In fact, autopsy and other post-mortem records in government hands, including photographs, have been routinely available to the public and press for inspection in Florida since enactment of the Public Records Law in 1909.[37] The record below shows that reporters and others regularly have used that access for a variety of purposes such as uncovering medical examiners' negligence or criminal activities. Chapter 2001-1 not only prohibits access to the Earnhardt photographs, but also effectively ends this historical access to thousands of other autopsy photographs available to the

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Cir. 2003) (citation omitted). These and other factors require invalidation of chapter 2001-1 in its entirety. Even if section 406.135(2)(a) could be severed, severance would render Chapter 2001-1 violative of article I, section 24(c), Florida Constitution. *See Campus Communications, Inc.*, 821 So. 2d at 394.

[37] *See* note 1 *supra*. The United States also makes autopsy and post-mortem photographs available. *See, e.g.*, Letter from National Archives & Records Administration stating autopsy photographs of Lee Harvey Oswald and Jay Tippett are open for viewing and available for reproduction (T2 & Ex. 58); CNN.com, *U.S. Releases Photos Said To Show Saddam's Sons' Bodies*, http://www.cnn.com/2003/WORLD/meast/07/24/sprj.irq.sons/ (posted July 24, 2003). *See also* App. to Earnhardt Amicus Brief in *Favish* at 20-23 (listing seven state laws which make autopsy records open).

public. The Florida Legislature's decision to remove autopsy photographs from public view is directly analogous to a governmental decision to remove thousands of books from public library shelves because the government believes that the contents of the books are no longer suitable for the public.

Removal of all autopsy photographs from public view cannot survive such scrutiny because there is no compelling governmental interest in doing so, as is demonstrated by the nine decade history of allowing access to such photographs during which access caused no serious harm to anyone. Moreover, even assuming that restricting access to some photographs serves a compelling governmental purpose, restricting access to all autopsy photographs, including the photographs of individuals who have been deceased for decades and who have no living relatives, serves no purpose whatsoever. The sweep of this statute is far broader than its legitimate application, assuming that it has any legitimate application at all.[38] The statute's removal of historically open records from public view is therefore facially unconstitutional.

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[38] *See Broadrick v. Oklahoma*, 413 U.S. 601, 615 (1973).

CONCLUSION

The petition for a writ of certiorari should be granted.

Dated: September 29, 2003

Respectfully submitted,

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821 So. 2d 388

IN THE DISTRICT COURT OF APPEAL
OF THE STATE OF FLORIDA
FIFTH DISTRICT

JULY TERM 2002

CAMPUS COMMUNICATIONS, INC.,

Appellant/Cross-Appellee,

v. Case No. 5D01-2419

TERESA EARNHARDT, and the Estate of DALE EARNHARDT, by and through its Personal Representative, TERESA EARNHARDT, for and on behalf of the Estate and for the Survivors, et al.

Appellees/Cross-Appellants.
_____/

Opinion filed July 12, 2002

Appeal from the Circuit Court for Volusia County, Joseph G. Will, Judge.

Thomas R. Julin & D. Patricia Wallace of Hunton & Williams, Miami, for Appellant/Cross-Appellee.

Charles T. Canady, General Counsel, and Simone Marstiller, Assistant General Counsel, Executive Office of the Governor, Tallahassee, Amicus Curiae, for Governor Jeb Bush.

Jonathan D. Kaney, Jr. and Daniel R. Bischof of Cobb, Cole & Bell, Daytona Beach, Amici Curiae, for Florida Society of Newspaper Editors, First Amendment Foundation, Reporters Committee for Freedom of the Press, and Student Press Law Center.

E. Thom Rumberger and Ernest H. Eubanks, Jr. of Rumberger, Kirk & Caldwell, P.A., Orlando, and Parker D. Thomson and Carol A. Licko of Hogan & Hartson, LLP, Miami, and Jon L. Mills and Timothy McLendon, Gainesville, and Dickson M. Lupo and Judson Graves of Alston & Bird, LLP, Charlotte, North Carolina, for Appellees/Cross-Appellants Teresa Earnhardt and the Estate of Dale Earnhardt, by and through its Personal Representative, Teresa Earnhardt, for and on behalf of the Estate and for the Survivors.

Thomas E. Warner, Solicitor General, and T. Kent Wetherell, II, Deputy Solicitor General, Office of the Solicitor General, Tallahassee, for Appellee/Cross-Appellant State of Florida.

Daniel D. Eckert, County Attorney, Deland, for Appellee/Cross-Appellant County of Volusia, Office of the Medical Examiner.

SAWAYA, J.

Campus Communications, Inc. (Campus) appeals the final judgment finding Chapter 2001-1, codified at section 406.135, Florida Statutes (2001), constitutional and retroactively applicable to the request made by Campus to view and copy the autopsy photographs of R. Dale Earnhardt.[1] We affirm.

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[1] Campus is the sole Appellant. Its position was supported by the brief of amici curiae: the Florida Society of Newspaper Editors, the First Amendment Foundation, the Reporters Committee for Freedom of the Press, and the Student Press Law Center. The Appellees are Teresa Earnhardt, the Estate of Dale Earnhardt, Dale Earnhardt Jr., Taylor Earnhardt, Dale Earnhardt, Inc., the Volusia County Office of the

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Factual Background And Issues

Mr. Earnhardt was a famous and very successful race car driver who became involved in a fatal crash during the Daytona 500 race on February 18, 2001. He was taken to Halifax Medical Center where, sadly, life-saving efforts were unsuccessful. Mr. Earnhardt was pronounced dead on that same date.

An autopsy was performed on February 19, 2001, by an assistant to the Volusia County Medical Examiner in accordance with Florida law governing accidental deaths.[2] In performing the autopsy, thirty-three photographs were taken which, according to the uncontradicted testimony of the medical examiner, were not of "diagnostic quality" and were taken solely as a back-up to the dictation system utilized by the medical examiner to record his findings for inclusion in a written autopsy report.

The written autopsy report, post-crash photographs of Mr. Earnhardt's car, a toxicology report and a sketch showing the markings on Mr. Earnhardt's body were promptly made available to the public. The autopsy photographs, however, were not released because on

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Medical Examiner, and the State of Florida. An amicus curiae brief was filed by Governor Jeb Bush supporting Appellees' position on the constitutionality of section 406.135. The cross-appeal filed by Appellees was abandoned.

[2] Section 406.11(1)(a)2., Florida Statutes (2001), provides that if a human being dies by accident in the State of Florida, the medical examiner of the district in which the death occurred or where the body is found "shall determine the cause of death and shall, for that purpose, make or have performed such examinations, investigations, and autopsies as he or she shall deem necessary or as shall be requested by the state attorney. . . ."

February 22, 2001, Mrs. Earnhardt sought and obtained an ex parte injunction precluding the medical examiner from releasing them. This injunction was obtained before any request for access to the photographs was made.

On February 23, 2001, the Orlando Sentinel newspaper requested the autopsy photographs. Michael Uribe, who operates a for-profit website on which he publishes celebrity autopsy photographs, also made a request for the photographs. Mr. Uribe had previously published the autopsy photographs of Neil Bonnett and Rodney Orr, both of whom were race car drivers killed in crashes at the Daytona International Speedway. Both requests were denied pursuant to the injunction.

The medical examiner, the Earnhardts and the newspaper interests represented by the Orlando Sentinel subsequently entered into a mediation agreement whereby they agreed that the photographs would be examined by an expert in biomechanics who would issue a report and, thereafter, the photographs would be permanently sealed. Neither Campus nor Mr. Uribe participated in the mediated settlement and on the same day the agreement was reached, Campus made its request for the photographs.

On March 29, 2001, the Florida Legislature enacted section 406.135, which was signed by Governor Bush and became effective on that same date. Upon passage of the statute, the Earnhardts amended their request to include permanent injunctive relief under the statute. Campus filed a cross-claim against the medical examiner seeking an order under the Public Records Act requiring the medical examiner to allow inspection and copying of the photographs. Trial subsequently commenced, evidence and testimony were presented, and the trial court rendered its

decision finding the statute constitutional and retroactively applicable to the requests made by Campus and Mr. Uribe.

The issues we are confronted with in the instant proceedings are 1) whether section 406.135 is overly broad and therefore unconstitutional; 2) whether the statute should be applied retroactively; and 3) whether the trial court erred in finding that Campus failed to establish good cause under the statute to allow inspection and copying of the photographs. We will proceed to address each issue in the order presented.

Constitutionality Of The Statute

General Principles and Legislative Findings

We begin our analysis with the generally accepted principle that "all laws are presumed constitutional" and "[t]he burden rests on the party challenging the law to show that it is invalid." *Chicago Title Ins. Co. v. Butler,* 770 So. 2d 1210, 1214 (Fla. 2000) (citations omitted). If any doubt exists as to the validity of a law, it must be resolved in favor of constitutionality where reasonably possible. *L.B. v. State,* 700 So. 2d 370 (Fla. 1997); *Department of Law Enforcement v. Real Prop.,* 588 So. 2d 957, 961 (Fla. 1991).

Both the Florida Constitution and the Public Records Act allow for the creation of exemptions to the Act by the Legislature, provided the newly enacted exemption 1) serves an identifiable public purpose and 2) is no broader than necessary to meet that public purpose. Art. I, § 24(c), Fla. Const.; § 119.15(4)(b), Fla. Stat. (2001). As to the first requirement, the Legislature must specifically state the public necessity which justifies the exemption. Art. 1,

§ 24(c), Fla. Const. In order to fulfill these constitutional and statutory requirements, the Legislature made the following findings:

> The Legislature finds that it is a public necessity that photographs and video and audio recordings of an autopsy be made confidential and exempt from the requirements of section 119.07(1), Florida Statutes, and Section 24(a) of Article I of the State Constitution. The Legislature finds that photographs or video or audio recordings of an autopsy depict or describe the deceased in graphic and often disturbing fashion. Such photographs or video or audio recordings may depict or describe the deceased nude, bruised, bloodied, broken, with bullet or other wounds, cut open, dismembered, or decapitated. As such, photographs or video or audio recordings of an autopsy are highly sensitive depictions or descriptions of the deceased which, if heard, viewed, copied or publicized, could result in trauma, sorrow, humiliation, or emotional injury to the immediate family of the deceased, as well as injury to the memory of the deceased. The Legislature notes that the existence of the World Wide Web and the proliferation of personal computers throughout the world encourages and promotes the wide dissemination of photographs and video and audio recordings 24 hours a day and that widespread unauthorized dissemination of autopsy photographs and video and audio recordings would subject the immediate family of the deceased to continuous injury. The Legislature further notes that there continue to be other types of available information, such as the autopsy report, which are less intrusive and injurious to the immediate family members of the deceased and which

> continue to provide for public oversight. The Legislature further finds that the exemption provided in this act should be given retroactive application because it is remedial in nature.

Ch. 2001-1, § 2, at 2, Laws of Fla.

We will address the specificity requirement first.

The Specificity Requirement

As to the requirement that the exemption serve an identifiable public purpose, the Legislature must "state with specificity the public necessity justifying the exemption." Art. I, § 24(c), Fla. Const. We find that chapter 2001-1, Laws of Florida, clearly satisfies this requirement. The legislative findings detail the graphic and often gruesome nature of such autopsy photographs and the trauma and emotional injury the immediate family of the deceased would likely suffer if these records were disclosed and disseminated to the public. The Legislature also recognizes the potential for exacerbation of such injury in light of the ever increasing use of the Internet and the proliferation of personal computers. These findings are supported by the evidence and testimony introduced in the proceedings before the trial court.

We need not address the specificity requirement any further because Campus does not forcefully challenge the Legislature's statement of public necessity. Rather, Campus focuses on the argument that the exemption is overly broad.

The Exemption Must Not Be Overly Broad

Campus contends that section 406.135 is unconstitutional because it is broader than necessary to meet the statute's public purpose. Specifically, Campus argues that the finding made by the Legislature that some photographs "may" show gruesome scenes and that trauma "could" result from publication of the autopsy photographs is explicit recognition that photographs are not always gruesome and that trauma does not always result from their viewing. Therefore, Campus asserts, the Legislature exempted more records than were necessary to serve the purpose of the statute.[3] We disagree that the statute is overly broad.

We find the scope of section 406.135 to be specific and narrow: it applies only to autopsy photographs and audio and video recordings of the autopsy. It does not apply to other records of the autopsy such as the written autopsy report and, therefore, those materials remain unrestricted public records. Moreover, in the instant case, the trial court found that there was no information that could be obtained from the autopsy photographs of Mr. Earnhardt that was not contained in the autopsy report which was published to the parties and the public.

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[3] Campus raises two other arguments: 1) the statute is unconstitutional because immediate family members may object and keep the records from being disclosed while other family members may not object to disclosure; and 2) the exemption is overly broad because the Legislature could have avoided the publication issue by simply allowing inspection alone. We find these arguments have little merit and therefore affirm the trial court as to these issues.

Equally important, despite the fact that autopsy photographs and audio and video recordings are no longer considered unrestricted public records, is the inclusion of the good cause provisions which do allow the publication of these restricted records if the statutory criteria are established. *See* § 406.135(2)(a), Fla. Stat. (2001). Thus the fact that the Legislature used "may," "could" and "often" is not evidence that the exemption is overly broad, but rather a recognition that circumstances may exist which would justify disclosure of autopsy photographs and audio and video recordings upon a showing of good cause. Moreover, use of the absolute terminology advocated by Campus such as "would," "always" and "must" would foreclose the possibility that disclosure could be made even upon a showing of good cause.

We find *Bryan v. State,* 753 So. 2d 1244 (Fla.), *cert. denied,* 528 U.S. 1185 (2000), analogous to the instant case. In *Bryan,* the court analyzed a public records exemption provided in section 945.10(1)(e), Florida Statutes (1999), which exempted from disclosure records and information of the Department of Corrections "which if released would jeopardize a person's safety." The Legislature had justified the adoption of this exemption by stating that "it is a public necessity that the department records . . . remain confidential and exempt from public disclosure . . . because to provide otherwise would *in some cases* conflict with other existing law or would reveal information that would jeopardize the safety of the guards, inmates, and others." *Id.* at 1250 (emphasis supplied). The legislative findings in *Bryan* that disclosure of the information "in some cases" would jeopardize an individual's safety could be considered constitutionally infirm on the same grounds advanced by Campus in the instant case,

but the supreme court approved the exemption as being "supported by a thoroughly articulated public policy." *Id.* at 1251 (footnote omitted). Like the court in *Bryan*, we find the exemption provided in section 406.135 to be supported by a thoroughly articulated public policy and reject the argument that it is overly broad.

Campus next assails the "good cause" provision of the statute, protesting that the Legislature did not define this term.[4] We find that this argument lacks merit because the statute requires consideration of specific criteria to determine whether good cause has been shown. *See* § 406.135(2)(a), Fla. Stat. (2001). Moreover, good cause is not a novel concept to our jurisprudence. Florida courts have applied good cause provisions in a variety of contexts, including the Public Records Act. *See, e.g.*, § 119.07(7)(a), Fla. Stat. (2001); *Department of Health & Rehabilitative Servs. v. Gainesville Sun Publ'g Co.*, 582 So. 2d 725 (Fla. 1st DCA 1991). Therefore, the statute is not invalid

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[4] Campus also argues that the good cause provision is an improper delegation to the judiciary of legislative authority. We reject this argument because the Legislature made the fundamental and primary policy declarations regarding disclosure of autopsy photographs and audio and video recordings of autopsies and has provided explicit and detailed guidelines and standards for the courts to apply in determining whether good cause has been established. *See Askew v. Cross Key Waterways*, 372 So. 2d 913 (Fla. 1978). Furthermore, acceptance of the delegation argument would make every other statute authorizing the courts to act upon a showing of good cause constitutionally suspect. *See, e.g.*, §§ 14.28, 39.202(5), 119.07(3), 240.2996(6), 288.075(2), 397.501(7)(a) 5., 828.30(5), 985.04(4)(a), 985.05(2), 985.212(1)(b), Fla. Stat. (2001).

because it fails to specifically define a term for which the courts already know the meaning.[5]

We find that section 406.135 serves an identifiable public purpose, is no broader than necessary to meet that public purpose and was enacted in accordance with the constitutional and legislative requirements we have previously discussed. The presumption of constitutionality has not been overcome by Campus. Therefore, we conclude that section 406.135 is constitutional. The next issue we must address is whether retroactive application of the statute is proper.

Retroactive Application

General Principles

When considering whether a statute should be retroactively applied, the courts should determine 1) whether there is clear evidence that the Legislature intended to apply the statute retrospectively; and 2) whether retroactive application is constitutionally permissible. *Metropolitan Dade County v. Chase Fed. Hous. Corp.*, 737 So. 2d 494 (Fla. 1999). The second inquiry is generally premised on a finding by the court that the Legislature has clearly expressed an intent that the statute apply retrospectively. *Id.*

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[5] *See, e.g., Levine v. Kaplan*, 687 So. 2d 863, 865 (Fla. 5th DCA) (defining good cause, in the context of rule 1.420(e) of the Florida Rules of Civil Procedure, as "proof of some compelling reason" or "excusable conduct other than negligence") (citing *Bruns v. Jones*, 481 So. 2d 544 (Fla. 5th DCA 1986)), *review denied*, 697 So. 2d 511 (Fla. 1997), *disapproved of on other grounds, Metropolitan Dade County v. Hall*, 784 So. 2d 1087 (Fla. 2001).

The first inquiry poses a question of statutory construction and requires application of a legal presumption which provides that statutes, in the absence of clear legislative intent to the contrary, should apply prospectively. Legislative intent must be determined primarily from the language of the statute and "[w]hen the language of the statute is clear and unambiguous and conveys a clear and definite meaning, there is no occasion for resorting to the rules of statutory interpretation and construction; the statute must be given its plain and obvious meaning." *Holly v. Auld,* 450 So. 2d 217, 219 (Fla. 1984) (quoting *A.R. Douglass, Inc. v. McRainey,* 137 So. 157 (Fla. 1931)); *see also Rollins v. Pizzarelli,* 761 So. 2d 294, 297 (Fla. 2000); *Chase Federal,* 737 So. 2d at 500 ("Of course, where the language of a statute contains an express command that the statute is retroactive, there is no need to resort to these canons of statutory construction.") (citations omitted); (*Modder v. American Nat'l Life Ins. Co.,* 688 So. 2d 330, 333 (Fla. 1997).

In the instant case, the Legislature was clear in its intent, twice expressly stating that section 406.135 was to be applied retroactively. § 406.135(4), Fla. Stat. (2001) ("This exemption shall be given retroactive application."); Ch.2001-1, § 2, at 2, Laws of Fla. ("The Legislature further finds that the exemption provided in this act should be given retroactive application because it is remedial in nature."). Therefore, we should neither apply the general rules of statutory construction to the statute nor indulge the presumption in favor of prospective application. *See Arrow Air, Inc. v. Walsh,* 645 So. 2d 422, 425 (Fla. 1994) (stating that "[t]he presumption against retroactive application of a law that affects substantive rights . . . is a well established rule of statutory construction" that

"comes into play in the absence of an express statement of legislative intent.") (citations omitted). Hence we consider next whether retroactive application of section 406.135 is constitutionally permissible.

In instances where the Legislature clearly expresses the intent that a statute is to be given retrospective application, as in the instant case, the courts will refuse to apply the statute retroactively "if the statute impairs vested rights, creates new obligations, or imposes new penalties." *State Farm Mut. Auto. Ins. Co. v. Laforet,* 658 So. 2d 55, 61 (Fla. 1995) (citations omitted); *see also Chase Federal.* On the other hand, "[r]emedial . . . statutes do not fall within the constitutional prohibition against retroactive legislation and they may be held immediately applicable to pending cases." *Village of El Portal v. City of Miami Shores,* 362 So. 2d 275, 278 (Fla. 1978) (citing *Turner v. United States,* 410 F.2d 837 (5th Cir. 1969); *City of Lakeland v. Catinella,* 129 So. 2d 133 (Fla. 1961); *Grammer v. Roman,* 174 So. 2d 443 (Fla. 2d DCA 1965)); *see also City of Orlando v. Desjardins,* 493 So. 2d 1027, 1028 (Fla. 1986) ("If a statute is found to be remedial in nature, it can and should be retroactively applied in order to serve its intended purposes.").

As will be discussed, we find that section 406.135 is remedial and reject the argument advanced by Campus that its retroactive application does abrogate or impair a vested right.

Section 406.135 Is Remedial

One of the primary purposes of enacting remedial legislation is to correct or remedy a problem or redress an injury. *See Roberts v. Butterworth,* 668 So. 2d 580 (Fla.

1996); *Desjardins; St. John's Village I, Ltd. v. Department of State, Div. of Corps.*, 497 So. 2d 990, 993 (Fla. 5th DCA 1986) ("By definition, a remedial statute is one which confers or changes a remedy; a remedy is the means employed in enforcing a right or in redressing an injury.") (citing *Grammer*). Specifically, in the context of disclosure of public records, the remedy sometimes lies in "mitigating the harsh provisions of the Florida Public Records Act. . . . " *Desjardins,* 493 So. 2d at 1029.

In *Desjardins,* for example, the City of Gainesville was sued by the plaintiff who claimed that he sustained injuries in an automobile accident caused by the City's negligent inspection and maintenance of a traffic signal. The plaintiff served upon the City a request to produce its litigation file under the Public Records Act. The City declined the request, arguing that the file was protected by the work product rule and the attorney-client privilege. The trial court entered an order requiring the City to produce the file and refused to retroactively apply the statutory exemption of section 119.07(3)(o), Florida Statutes, which exempted from disclosure the work product of the government's attorneys. The trial court refused to apply the exemption because the statute was enacted after the cause of action accrued. The Florida Supreme Court held that it was error not to apply the statute retroactively because it was enacted to remedy "the imbalanced posture and the disadvantaged status of public entities involved in litigation under the Public Records Act" prior to enactment of the exemption contained in the statute. *Desjardins,* 493 So. 2d at 1029. Moreover, the court noted that the legislative history of the statute recognized the courts' concern over this problem and the need for "legislative resolution of the matter." *Id.*

In *Roberts,* a defendant sought disclosure of all public records held by the Attorney General's Office related to himself. He appealed after the trial court found the records sought either were not public records or were exempt under the work product rule. On appeal, the defendant argued that the trial court erred in applying the statutory capital collateral litigation work product exemption retroactively to a public records request that pre-dated the effective date of the new exemption. The supreme court rejected this argument and held:

> Even though this particular provision did not take effect until October 1, 1995, the legislative history indicates that the statute is remedial in nature and thus can be applied retroactively. *See City of Orlando v. Desjardins,* 493 So. 2d 1027 (Fla. 1986) (holding that statutory work product exemption in chapter 119 was remedial in nature and thus applicable to cause of action that accrued prior to its effective date).

Roberts, 668 So. 2d at 581-82 (footnote omitted). The court noted that the Legislature had justified making the statute remedial on the grounds that the "'premature disclosure of this information could be detrimental to the Attorney General's legal representation in these proceedings'" and "'the public harm in disclosing this work product significantly outweighs any public benefit derived from disclosure.'" 668 So. 2d at 582 n.5 (quoting ch. 95-398, §17, at 3266, Laws of Fla.).

Similarly, the Legislature perceived the public necessity to correct the problems associated with public dissemination of autopsy photographs, especially over the Internet. Finding that this sort of public display of a decedent's remains is not only injurious to the family

members of the decedent, but morally reprehensible and anathema to the citizens of Florida, the Legislature enacted section 406.135 to mitigate the harsh provisions of the Act that would allow public disclosure of such records. Realizing the necessity for *immediate* resolution of this problem, the Legislature declared that "the exemption provided in this act should be given retroactive application because it is remedial in nature." Ch.2001-1, §2, at 2, Laws of Fla.[6]

Campus argues, however, that labeling a statute remedial does not necessarily mean that it should be automatically applied retroactively if it impairs vested rights, creates new obligations, or imposes new penalties. We find language in *Chase Federal, Laforet,* and *Arrow Air* that supports this argument. *See also Catinella.* Therefore, because Campus contends that section 406.135 abrogates Campus's vested right to inspect and copy the autopsy photographs, we will next consider whether retroactive application of the statute should be prohibited on this ground.

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[6] The evidence and testimony contained in the record in the instant case confirm the need for this remedial exemption. The trial court took judicial notice that numerous websites exist that display autopsy photographs. The record in the instant case also includes graphic and disturbing autopsy photographs of NASCAR drivers Neil Bonnett and Rodney Orr which were published on Mr. Uribe's website the day before chapter 2001-1 became law. Mr. Bonnett's daughter and Mr. Orr's father testified about the emotional distress caused by the publication and viewing of the autopsy photographs of their father and son and Mrs. Earnhardt testified concerning the emotional distress that would result from even the potential publication or public viewing of her deceased husband's autopsy photographs.

Retroactive Application Of Section 406.135
Does Not Abrogate A Vested Right

The courts have been loath to formulate a definition of "vested right" that can be applied in all cases with precision and certainty. A general definition is found in *City of Sanford v. McClelland,* 163 So. 513 (Fla. 1935), wherein the court held that "[a] vested right has been defined as 'an immediate, fixed right of present or future enjoyment' and also as 'an immediate right of present enjoyment, or a present, fixed right of future enjoyment.'" *Id.* at 514-15 (citing *Pearsall v. Great N. Ry. Co.,* 161 U.S. 646 (1896)). "'[T]o be vested a right must be *more than a mere expectation based on an anticipation of the continuance of an existing law;* it must have become a title, legal or equitable, to the present or future enforcement of a demand,. . . . '" *Division of Workers' Comp., Bureau of Crimes Comp. v. Brevda,* 420 So. 2d 887, 891 (Fla. 1st DCA 1982) (emphasis supplied) (quoting *Aetna Ins. Co. v. Richardelle,* 528 S.W.2d 280, 284 (Tex. Civ. App. 1975)); *see also Lamb v. Volkswagenwerk Aktiengesellschaft,* 631 F. Supp. 1144, 1449 (S.D. Fla. 1986); *Clausell v. Hobart Corp.,* 515 So. 2d 1275, 1276 (Fla. 1987), *cert. denied,* 485 U.S. 1000 (1988); *In re Will of Martell,* 457 So. 2d 1064, 1068 (Fla. 2d DCA 1984) ("To be vested, a right must be more than a mere expectation based on anticipation of the continuance of an existing law. . . . ") (citation omitted).

We are here concerned with the concept of vested rights in the context of the constitutional proscription against retrospective application of legislation. Within this context, a vested right is a "fixed" right that cannot be abrogated or taken away without violation of the possessor's right to due process. *See Chase Federal,* 737 So. 2d at 503 ("Generally, due process considerations prevent the

State from retroactively abolishing vested rights.") (citation omitted). The vested right claimed by Campus is the right to inspect and copy the autopsy photographs of Mr. Earnhardt. We disagree that this is a vested right for two reasons: 1) the right to inspect and copy public records is a right subject to divestment by enactment of statutory exemptions by the Legislature; and 2) the rights provided under the Public Records Act are public rights.

While the Public Records Act grants to Florida citizens the right to inspect and copy public records, "the legislature also has the prerogative to place reasonable restrictions on that right." *Henderson,* 745 So. 2d at 326 (citation omitted). We, therefore, begin our analysis by noting that all public records are subject to public inspection and copying *unless* the records fall within a specific statutory exemption enacted by the Legislature. Both the Florida Constitution and the Public Records Act specifically allow for the creation of exemptions. Article I, section 24(c) of the Florida Constitution provides in pertinent part that "[t]he legislature, however, may provide by general law for the exemption of records from the requirements of subsection (a)." Section 119.15(4)(b), Florida Statutes (2001), similarly provides in pertinent part that "[a]n exemption may be created or maintained." Thus both the Florida Constitution and the Public Records Act declare that the right to inspect and copy public records is a right subject to divestment by legislative enactment. Hence, the right claimed by Campus to view the autopsy photographs is not a "fixed" right and thus it is not a vested right within the context of the constitutional prohibition against retroactive application of legislation. Rather, it is more akin to "an expectation based on an anticipation of the continuance of an existing law" with the "existing law"

being the Public Records Act, and the "anticipation" being the maintenance of the current provisions of the Act unchanged by the Legislature's enactment of exemptions.

In *State v. White,* 194 So. 2d 601 (Fla. 1967), for example, the Legislature enacted a statute that exempted certain motor carriers from having to obtain a certificate of public convenience and necessity from the Public Service Commission. The Legislature subsequently enacted a statute that eliminated this exemption, thereby imposing on carriers the requirement that they obtain a certificate. The defendant, who apparently had been a carrier prior to the enactment of the subsequent statute, was charged, after the statute went into effect, with transporting property on the public highways without the required certificate. The defendant claimed that the subsequent statute was unconstitutional and that the charges against him should be dismissed. The court disagreed and held that "[i]t is in accord with well recognized law and principle that [defendant] did not receive by virtue of any law or circumstance an absolute vested right to continue the operation in question without limitation or the legal possibility of subsequent abrogation." *Id.* at 603. Likewise, we conclude that Campus did not obtain by virtue of the Public Records Act or the Florida Constitution a vested right to copy or view the autopsy photographs of Mr. Earnhardt because the right was limited by "the legal possibility of subsequent abrogation."

Moreover, the Florida courts have consistently recognized that the right to inspect and copy public records

under the Public Records Act is a public right.[7] The United States Supreme Court has held that for purposes of determining whether it is appropriate to allow retroactive application of a statute, only private, and not public rights, may become vested in this constitutional sense. *Hodges v. Snyder,* 261 U.S. 600 (1923). In *Hodges,* the plaintiffs, as resident taxpayers, brought suit challenging the validity of a consolidated school district which had been organized by the merger of several smaller districts. The lower court held that the attempted organization of the consolidated school district was not authorized by law and entered judgment holding the consolidation invalid. Thereafter, the Legislature enacted a statute legalizing and validating all proceedings relating to the consolidated school district. The issue presented to the Court was whether retroactive application of the new statute deprived the plaintiffs of a vested right without due process. The Court recognized the general rule that private rights which have been vested by a judgment cannot be taken away by subsequent

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[7] *See Memorial Hospital-West Volusia, Inc. v. News-Journal Corp.,* 784 So. 2d 438 (Fla. 2001); *Allen v. Butterworth,* 756 So. 2d 52, 65 (Fla. 2000) ("This Court has recognized that 'chapter 119 grants a substantive right to Florida citizens,' on which the Legislature 'has the prerogative to place reasonable restrictions.' ") (quoting *Henderson v. State,* 745 So. 2d 319, 326 (Fla. 1999)); *Henderson,* 745 So. 2d at 328 n. 5 ("In interpreting article I, section 24 of the Florida Constitution, we have stated that 'public officials must conduct public business in the open and . . . public records must be made available to all members of the public.' ") (quoting *State ex rel. Clayton v. Board of Regents,* 635 So. 2d 937, 938 (Fla. 1994)); *Housing Auth. of City of Daytona Beach v. Gomillion,* 639 So. 2d 117, 121 (Fla. 5th DCA 1994) ("It is the policy of . . . the Florida Public Records Act . . . that the records of public bodies should be accessible to the public absent a clear and specific exemption from disclosure.").

legislation. The Court held, however, that the rule against retroactive application of legislation does not apply to public rights, citing *In re Clinton Bridge,* 77 U.S. 454 (1870), and *Pennsylvania v. Wheeling & Belmont Bridge Co.,* 59 U.S. 421 (1855). The Court held that the right claimed by the plaintiff was a public right and therefore could not be considered a vested right for purposes of preventing retrospective application of the statute. The Court explained:

> It is true that, as they contend, the private right of parties which have been vested by the judgment of a court cannot be taken away by subsequent legislation, but must be thereafter enforced by the court regardless of such legislation.
>
> This rule, however, as held in the Wheeling Bridge Case, does not apply to a suit brought for the enforcement of a public right, which, even after it has been established by the judgment of the court, may be annulled by subsequent legislation and should not be thereafter enforced; although, in so far as a private right has been incidentally established by such judgment, as for special damages to the plaintiff or for his costs, it may not be thus taken away. . . .
>
> In the Wheeling Bridge Case, as in the Clinton Bridge Case, the public right involved was that of abating an obstruction to the navigation of a river. The right involved in the present suit, of enjoining the maintenance of an illegal school district and the issuance of its bonds, is likewise a public right shared by the plaintiffs with all other resident taxpayers. And while in the Wheeling Bridge Case the bill was filed by the State, although partly in its proprietary capacity

> as the owner of certain canals and railways, the doctrine that a judgment declaring a public right may be annulled by subsequent legislation, applies with like force in the present suit, although brought by individuals primarily for their own benefit; the right involved and adjudged, in the one case as in the other, being public, and not private.

261 U.S. at 603-04 (citations omitted).

Like the Court in *Hodges,* the Florida Supreme Court, in *Chase Federal,* held that due process considerations prevent the retroactive application of a statute when vested rights are abrogated. The Florida courts have consistently held that due process protects private rights. *J.B. v. Florida Dep't of Children & Family Servs.,* 768 So. 2d 1060 (Fla. 2000); *Department of Law Enforcement.*[8]

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[8] As explained by the court in *Department of Law Enforcement*:

> The basic due process guarantee of the Florida Constitution provides that "[n]o person shall be deprived of life, liberty or property without due process of law." Art. I, § 9, Fla. Const. Substantive due process under the Florida Constitution protects the full panoply of *individual rights* from unwarranted encroachment by the government. . . .
>
> > . . . Procedural due process under the Florida Constitution guarantees to every citizen the right to have that course of legal procedure which has been established in our judicial system for the protection and enforcement of *private rights.*

Department of Law Enforcement, 588 So. 2d at 960 (emphasis supplied) (citations omitted) (quoting *State ex rel. Gore v. Chillingworth,* 171 So. 649, 654 (Fla. 1936) (citations omitted)); *see also Miller v. Nolte,* 453 So. 2d 397, 401 (Fla. 1984) ("Persons have a right to due process when the protection and enforcement of their private rights are at issue.")

(Continued on following page)

We find that the choice of due process as the abiding constitutional principle that dictates the resolution of issues relating to the prohibition of retroactive legislation that abrogates a vested right adds currency to the general principle adopted in *Hodges* and numerous courts in other jurisdictions that the prohibition does not apply to public rights.[9]

If we were to accept the argument advanced by Campus that once a public record is created, a member of the public has a vested right to inspect and copy it, we would have to conclude that a statute that establishes an exception to the Public Records Act may never be applied retroactively. Adoption of such a rule would eliminate the Legislature's ability to enact remedial legislation to immediately resolve problems caused by public disclosure and to mitigate the sometimes harsh provisions of the Public Records Act. Moreover, adoption of such a rule would require us to ignore decisions of the courts of this state that have given retroactive application to such statutory exemptions. *See Roberts; Desjardins.* This we

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(citing *Fuentes v. Shevin,* 407 U.S. 67 (1971); *Goldberg v. Kelly,* 397 U.S. 254 (1970)).

[9] *Mendly v. County of Los Angeles,* 28 Cal. Rptr. 2d 822 (Cal. Ct. App. 1994); *Van de Kamp v. Gumbiner,* 270 Cal. Rptr. 907 (Cal. Ct. App. 1990); *Robinson v. City of Winfield,* 219 P. 273 (Kan. 1923); *Holen v. Minneapolis-St. Paul Metro. Airports Comm'n,* 84 N.W.2d 282 (Minn. 1957); *Yow v. Tishomingo County Sch. Bd.,* 172 So. 303 (Miss. 1937); *Becker v. Adams,* 181 A.2d 349 (N.J. 1962); *Bradford v. Suffolk County,* 15 N.Y.S.2d 353 (N.Y. App. Div. 1939), *judgment affirmed as modified,* 28 N.E.2d 932 (N.Y. 1940); *Jackson County v. Jackson Educ. Serv. Dist.,* 752 P.2d 1224 (Or. Ct. App.), *review denied,* 758 P.2d 346 (Or. 1988); *Inman v. Railroad Comm'n,* 478 S.W.2d 124 (Tex. App. 1972); *Leuch v. Egelhoff,* 51 N.W.2d 7 (Wis. 1952).

cannot do. Hence we reject the argument advanced by Campus that retroactive application of section 406.135 abrogates a vested right.

The last issue we must address is whether the trial court erred in finding that Campus failed to establish good cause under section 406.135.

Good Cause

Campus argues that even if section 406.135 is constitutional, the trial court erred in finding that Campus failed to establish good cause for release of the photographs. The statute requires consideration of the following factors in determining good cause: 1) whether disclosure is necessary so that the public can evaluate the government's performance; 2) the seriousness of the intrusion into the family's right to privacy; 3) whether disclosure is the least intrusive method available; and 4) the availability of similar information in other public records, regardless of form. § 406.135(2)(a), Fla. Stat. (2001).

As to the first factor, while the public obviously has a great interest in making certain its government, the medical examiner in the instant case, carries out its duties in a responsible fashion, that interest cannot be served by viewing the autopsy photographs of Mr. Earnhardt because the uncontradicted testimony establishes that the photographs are not of diagnostic quality. Moreover, the testimony further establishes that there is nothing that can be discerned from the photographs that is not contained in the autopsy report and other materials that have been released to Campus and the public. If it cannot be determined from the photographs that the cause of death was anything other than what the medical examiner

concluded, the photographs will not aid in assuring that the government is performing up to the required standard. Regarding the argument advanced by Campus that the photographs are needed to evaluate NASCAR safety requirements, the trial court found, and we agree, that the safety requirements of NASCAR, a private entity, do not implicate the public's interest in evaluating governmental performance sufficient to release the photographs.

The second factor weighs very heavily in favor of nondisclosure. The medical examiner testified that the photographs were "gruesome, grisly and highly disturbing," and the physician attending Mr. Earnhardt after the accident confirmed this. The trial court found that such publication would "be an indecent, outrageous, and intolerable invasion, and would cause deep and serious emotional pain, embarrassment, humiliation and sadness to Dale Earnhardt's surviving family members." It is evident from our review of the record that the publication of the nude and dissected body of Mr. Earnhardt would cause his wife and children pain and sorrow beyond the poor power of our ability to express in words.

Regarding the third factor, the trial court found that there were no less intrusive means available for preventing trauma to the Earnhardt family. Campus argues that inspection alone would not cause a serious intrusion into the privacy rights of the Earnhardt family. However, the trial court rejected this argument, finding that the mere knowledge that the photographs would be accessible for inspection was the cause of overwhelming distress to the Earnhardt family.

The fourth factor also weighs in favor of nondisclosure. As we previously stated, the autopsy report and

other information was made available to the public and, given the poor quality of the photographs and the fact that they were only made as a back-up to the medical examiner's dictation system, disclosure of the photographs would reveal nothing that is not contained in the autopsy records that were released.

The standard of review regarding issues of good cause requires us to determine whether the trial court abused its discretion in making its decision. *See Palokonis v. EGR Enters. Inc.*, 652 So. 2d 482 (Fla. 5th DCA 1995); *Williams v. Estate of Williams*, 493 So. 2d 44 (Fla. 5th DCA 1986). Based on our thorough review of the record in the instant case and our analysis of this issue, we conclude that the trial court did not abuse its discretion in finding that Campus failed to establish good cause under section 406.135.

Conclusion

The Florida Constitution gives every citizen the right to inspect and copy public records so that all may have the opportunity to see and know how the government functions. It is also a declared constitutional principle that every individual has a right of privacy, and while our constitution does not catalogue every matter that one can hold as private, autopsy photographs which display the remains of a deceased human being is certainly one of them. But we need not say so because the Legislature has said so and that is its prerogative, not ours. Thus our function here has not been to weigh these two constitutional rights with respect to autopsy photographs and determine whether the right that helps ensure an open government freely accessible by every citizen is more

significant or profound than the right that preserves individual liberty and privacy. Rather, our function has been to determine whether the Legislature has declared that the latter prevails over the former in a manner that is consistent with the constitutional provisions that bestow upon it the power to do so. We have fulfilled our judicial responsibility in this matter by determining whether section 406.135 was constitutionally enacted and whether it was properly applied under the facts and circumstances of the instant case. Having concluded that it was, we affirm the judgment under review.

We conclude our judicial responsibility by certifying to the Florida Supreme Court the following questions to be of great public importance:

1. IS SECTION 406.135 CONSTITUTIONAL?

2. IF SECTION 406.135 IS CONSTITUTIONAL, SHOULD IT BE APPLIED RETROACTIVELY?

AFFIRMED; QUESTIONS CERTIFIED.

PETERSON and GRIFFIN, JJ., concur.

29 Media L. Rep. 2173

IN THE CIRCUIT COURT, SEVENTH JUDICIAL CIRCUIT, IN AND FOR VOLUSIA COUNTY, FLORIDA

TERESA EARNHARDT and the Estate of DALE EARNHARDT, by and through its personal representative, TERESA EARNHARDT, for and on Behalf of The Estate and for the Survivors,

Plaintiffs,

vs.

VOLUSIA COUNTY, OFFICE OF THE MEDICAL EXAMINER,

Defendant. /

CASE NO.: 2001-30373-CICI
DIVISION 31

FINAL JUDGMENT, FINDINGS OF FACT AND CONCLUSIONS OF LAW

A non-jury trial was conducted before the court from June 11 through 13, 2001. Appearances were entered by or on behalf of:

- The plaintiffs, including Teresa Earnhardt, Dale Earnhardt's widow; Taylor Earnhardt, their twelve-year old daughter; Dale Earnhardt, Jr., Dale Earnhardt's adult son (collectively, the "Earnhardt family"); and Dale Earnhardt, Incorporated;

- The defendant, County of Volusia;
- The intervener, the Solicitor General on behalf of the Attorney General and the State of Florida;
- The intervener, Orlando Sentinel Communications Company;
- The intervener, Campus Communications, Inc.;
- The individual intervener, Mr. Michael Uribe;
- The Honorable Jeb Bush, the Governor of the State of Florida, submitted a memorandum of law and a memorandum of law and argument were submitted by the First Amendment Foundation, the Florida Society of Newspaper Editors, and The Reporters' Committee for Freedom of the Press, all of whom appeared as *amici curiae*.

FINDINGS OF FACT

The court finds the following facts:

1. The court has before it a broad representation of the varied interests in both the dispute to obtain access to the autopsy photographs of Dale Earnhardt, and the legal controversy regarding the constitutionality of Florida Statute 2001-1. Any person or entity expressing an interest in intervention to the court was permitted to intervene to insure that as many divergent views as possible would be thoroughly presented. All persons and entities requesting access to the autopsy photographs of Dale Earnhardt have been advised of these proceedings by the court and have been afforded an opportunity to participate. It has

been this court's intention to liberally permit intervention so that all those with any interest in the autopsy photographs could be heard in this matter.

2. This action began as a petition for temporary and permanent injunctive relief against the defendant, Volusia County Medical Examiner, seeking the sealing of the autopsy photographs of the late Dale Earnhardt.

3. Mr. Earnhardt was a well-known racecar driver who died as result of an accident in a race held at Daytona International Speedway on February 18, 2001.

4. Mr. Earnhardt was pronounced dead at Halifax Medical Center in Daytona Beach, Volusia County. In accordance with Florida law governing accidental deaths, an autopsy was performed at the office of the Volusia County Medical Examiner on February 19, 2001.

5. Thirty-three (33) photographs were taken during the autopsy by the Assistant Medical Examiner. A catalog of those photographs has been admitted into evidence.

6. The autopsy photographs are not of diagnostic quality. The Medical Examiner testified that the autopsy photographs were completed in accordance with the Medical Examiner's normal practice. They were taken solely and exclusively as a backup to the dictation system, so the physician could refer to them to refresh his recollection in the event any portion of the dictation was lost and the report had to be re-dictated. Once that dictation was memorialized by the official report, the autopsy photographs became inconsequential and were of no further use to the Medical Examiner's office.

7. Information concerning the results of this particular autopsy was promptly and properly made accessible to

the public by the Medical Examiner. That information included photographs of the wrecked race car in which Mr. Earnhardt died, the written report of the autopsy including a sketch showing the markings on Mr. Earnhardt's body, a toxicology report, an extensive description of Mr. Earnhardt's injuries, and data about Mr. Earnhardt's physical condition. That report and the remainder of the Medical Examiner's file on this autopsy, with the exception of the autopsy photographs, have been widely available to the public.

8. Mrs. Earnhardt filed this action on February 22, 2001. A temporary injunction was entered *ex parte* on that same date enjoining the Medical Examiner from releasing the autopsy photographs and affording Mrs. Earnhardt an opportunity to assert her family's right to privacy.

9. On February 23, 2001, a request for access to the autopsy photographs was made by the Orlando Sentinel. It was denied by the Medical Examiner in compliance with the temporary injunction. Michael Uribe requested the photographs shortly thereafter and was similarly denied. The Orlando Sentinel and Uribe were both granted leave to intervene in the present cause. The Orlando Sentinel was joined by a myriad of media interests,[1] all of which were represented by counsel for the Orlando Sentinel [hereinafter the Sentinel Group]. A later request for access to the autopsy photographs was made by Campus Communications, Inc., which was similarly granted leave to

[1] Orlando Sentinel Communications Company, Media General Operations, Inc., Media General Broadcasting, Inc. d/b/a WFLA-TV Channel 8, Miami Herald Publishing Co., the Tribune Company, and the Los Angeles Times

intervene. All requests for access to the photographs were properly denied by the County of Volusia.

10. Court-ordered mediation was conducted with the plaintiffs, the Medical Examiner, the Orlando Sentinel, and Michael Uribe. A partial settlement of the case was reached among the plaintiffs, the Medical Examiner, and the Sentinel group. Neither Campus Communications, nor Uribe participated in the mediated settlement.

11. Under the terms of the mediated settlement agreement the autopsy photographs and the autopsy report were examined and evaluated by a medical doctor who is also reputed to be an expert in biomechanics, Barry Myers, M.D., of Duke University. Dr. Myers was selected by the mediator, John Upchurch, Esquire, who was appointed as a special master by consent of the parties to the mediation agreement. Dr. Myers rendered a detailed written report of his findings as the mediator had directed him. It included his assessment of the Earnhardt autopsy as it related to the mechanical cause of Mr. Earnhardt's death; i.e., whether the cause of death, a basilar skull fracture, was the result of a head whip or of striking the steering wheel, and whether there had been a blow to the top of the head. That report is in the record in this case and has been made available to the public. Dr. Myers does not refer to the autopsy photographs in his report.

12. The uncontroverted testimony of the Medical Examiner in this cause demonstrates that autopsy photographs vividly and graphically depict decedents' bodies in various positions and in various degrees of dissection, as one would expect during the course of a complete autopsy. The Medical Examiner testified that autopsy photographs are gruesome and would be upsetting to many people. He

further agreed that he would not share autopsy photographs with his teenaged daughter. The catalog of the autopsy photographs in the present case provides a graphic descriptive list of the specific photographs, which are consistent with the typical autopsy. The autopsy photographs are without question gruesome, grisly, and highly disturbing to a person of ordinary and normal sensibilities.

13. The release of the autopsy photographs to any members of the public could result in immediate, widespread dissemination of these disturbing images, including posting on the world wide web.

14. There are numerous web sites which specialize in posting gruesome, grisly and disturbing images of dead or severely injured persons, as well as autopsy photographs. Some of these websites are findadeath.com, choosedeath.com and websitecity.com. It is a virtual certainty that these particular autopsy photographs would be posted on one or more of these web sites for immediate, worldwide viewing if they became publicly available.

15. The intervener, Mr. Uribe, has already published autopsy photographs of Neil Bonnett and Rodney Orr, two racecar drivers who died in accidents at the Daytona International Speedway, on his web site, websitecity.com. Relatives of those decedents testified in the present proceeding. The court recognizes that not only the publication of their loved ones' autopsy photographs on the internet, but also the knowledge that these photographs are available to the public for unnecessary perusal caused overwhelming personal distress and trauma to them and their families. It was clear from their testimony, and the testimony of Teresa Earnhardt, that it is the unnecessary

inspection itself – not necessarily the frequency with which it occurs – that constitutes the gravamen of the injury to a family. The witnesses in this case were obviously shocked by the use of the World Wide Web, but they also felt significantly invaded by unnecessary inspection on a more limited scale. The character of this particular injury is such that unwarranted invasions of the family's privacy, regardless of the frequency, leave a scar.

16. The publication of a person's autopsy photographs constitutes a unique, serious, and extraordinarily intrusive invasion of the personal privacy of that person's surviving family members, particularly their children, parents, and spouse. The wide viewing of such personal and painful photographs by people all over the world who are strangers to the family will cause serious pain, anxiety, worry, and discomfort to the family members. The availability of such photographs on the web makes the dissemination of the photographs very easy for anyone with access to a computer modem. That knowledge alone would cause continuous pain and anxiety to the family and prolong their suffering.

17. The court specifically finds that examination of these autopsy photographs by any means would be an indecent, outrageous, and intolerable invasion, and would cause deep and serious emotional pain, embarrassment, humiliation and sadness to Dale Earnhardt's surviving family members.

18. There has been no reason presented in this case to suggest that an examination or copying of the subject autopsy photographs would be helpful in any degree whatsoever in evaluating the performance or accountability of the government. The hypotheses relating to NASCAR racing

safety raised by the interveners do not meaningfully implicate governmental accountability. While there may be a number of *private* interests implicated, the suggestion of a controversy within NASCAR by the interveners certainly does not implicate a *governmental* interest. Those issues offered for the consideration of the court were thinly veiled excuses to gain access to the court either for the purpose of arguing the constitutionality of the statute or for making a profit at the expense of this family. They are strained arguments and are entirely too tenuous for realistic discussion.

19. Similar information about Mr. Earnhardt's autopsy remains available to the public through the autopsy report, the other materials in the Medical Examiner's file (including body diagrams and sketches), and Dr. Myers' report. According to the testimony herein, the autopsy photographs merely depict the same information contained in the thorough written materials described above. Dr. Bohanan, Dale Earnhardt's treating physician at the time of his demise, reviewed the autopsy photographs and testified in conformity with the Medical Examiner that these particular autopsy photographs simply do not provide any additional useful information.

20. The evidence in this case clearly demonstrates that the examination of the autopsy photographs by the interveners or other members of the general public, even if no reproduction were allowed, would constitute a violation of the Earnhardt family's right to privacy of the highest order. Viewing of the photographs would be disturbing, humiliating, and painful, and would result in a violation of the right of privacy of the members of the Earnhardt family.

CONCLUSIONS OF LAW

While the temporary injunction in this case was in place, but before the final hearing on the prayer for permanent injunction had been scheduled, the Florida Legislature adopted Chapter 2001-1. The new law was quite obviously intended for application in the present case. Before the new law was adopted, the plaintiffs simply sought a temporary and permanent injunction enjoining the Medical Examiner from permitting the examination and copying of a specific set of autopsy photographs. The plaintiffs argued a legal theory to the effect that there is a disclosural right of privacy arising under Article 1, Section 23, of the Florida Constitution and the Fourteenth Amendment to the United States Constitution. The plaintiffs argued that this common law right of privacy would extend to protect the disclosure of autopsy photographs because that right is superior to, and would preempt, the Public Records Law. The adoption of the new law changed the procedural and substantive character of the present litigation in midstream. The plaintiffs continued to seek permanent injunctive relief under their legal theory regarding the disclosural right of privacy arising under Article 1, Section 23, of the Florida Constitution and the Fourteenth Amendment to the United States Constitution. But, they concurrently sought relief under Chapter 2001-1, which this court has construed to also be a proceeding injunctive in nature. Campus Communications and Uribe sought a declaration of the unconstitutionality of Chapter 2001-1 and a finding contrary to the plaintiffs on the common law right of disclosural privacy. The County of Volusia and the State of Florida sought a declaration that the new statute is constitutional and that there is no common law disclosural privacy right which would serve

to impede the application of the Public Records Law, as it existed prior to the adoption of Chapter 2001-1.

The court first heard argument from all parties and *amici curiae* regarding the constitutionality of Chapter 2001-1 in order to frame the issues for the evidentiary portion of the case.

This case involves a collision of cataclysmic proportion between two extremely valuable rights and their zealous proponents. Modern times have witnessed an erosion of the individual expectation of privacy to a pathetic point. We live in a world in which the individual can anticipate that everything from one's market habits to one's personal health (and everything in-between) are known to anyone with the electronic capacity to eavesdrop. The curiosity of the public combined with the need of the commercial marketers and the media to feed a sated population with an increasingly sensational daily product have led to a substantially unhealthy environment. Nosiness has become the order of the day – so long as it is amusing or entertaining. Our society has tacitly accepted a standard that permits invasions of privacy of gross dimension, and we have become forgetful of some very basic concepts. Foremost among them is the simple notion that many things are nobody else's business. We are entitled to be let alone; to have our private space – a space that is not subject to invasion by the uninvited. Chapter 2001-1 enthusiastically embraces this simple notion, as does this court. It is unfortunate that some private documents, such as autopsy photographs, must by their very nature come into the hands of the government thereby drawing another fundamental right – the right of the public to scrutinize its government – into conflict. The public records laws of the

State of Florida proudly embody the belief of all knowledgeable citizens that a government that operates openly is a better government than one that operates in secrecy. The public is encouraged to be interested in government and to personally inspect and copy whatever the government holds to insure that the government, and everyone within it, remains true to our ideals, or at least minimum standards, of governance.

In adopting the new law the legislature was wise in recognizing that autopsy photographs, of all things, should be presumptively private; that is, they will not be shared with the public, even though they are in the very public hands of the government, unless it can be established that good cause exists for their review in the course of conducting legitimate scrutiny of the government. Autopsy photographs are different in character than other documents retained by the government and, in spite of the sophisticated arguments in favor of their open release, they are the "business" of very few people. The judicial review built into Chapter 2001-1 to determine whether there is good cause to release autopsy photographs protects the public from the unjustified withholding of documents that may, indeed, reflect badly upon the government. It does not require a great imagination to conjure images of a governmental medical examiner or other official who would resist the release of autopsy documents to conceal misfeasance or malfeasance or to protect another. It is equally obvious that a governmental official ought to have the means to demonstrate that he or she is free of blame or fault when it is inappropriately suggested. The legislature has, thus, protected both interests with a balancing test that limits the scope of the public's inquiry to those circumstances in which the inquiry is legitimately engaged

for reasonably defined purposes. Article 1, Section 24, of the Florida Constitution permits the legislature to popularly define the scope of constitutional protection of the public records laws by creating exemptions. The legislature may only create such exemptions, however, if it states with specificity the public necessity justifying the exemption and creates an exemption no broader than necessary to accomplish the stated purpose of the law. The constitutional specificity requirement is easily met in the subject legislative enactment. The interveners, though, have asserted a reasonable question regarding the breadth of the exemption. It is suggested by the proponents of the public records laws that a more narrow exemption could possibly have been carved to keep it within constitutional parameters. It is argued that the scope could have been limited by legislatively permitting the examination of autopsy photographs and requiring good cause to copy them. After hearing the testimony in this case the court is convinced that the stated purpose of the legislation may not reasonably have been accomplished under such a scheme. There is a substantial injury to families when strangers are permitted *carte blanche* to go through their loved ones' autopsy photographs. In a decent society that should be recognized *per se*. The burden borne by those families subjected to this unnecessary cruelty is much greater than that to be borne under this new statute by those wishing to mind the business of others. It is just and fitting that those wishing to view the personal, private photographs of a family's loved one should give a decent explanation for doing so. We have completely lost our way when we begin seriously entertaining argument from people who believe it to be appropriate in our society to examine and/or publish other families' autopsy photographs – *autopsy photographs* – simply because they have

unfortunately found their way into the public record. While some may say the legislature did not do a perfect job in adopting this statute, this court is convinced it performed within its constitutional directives and is to be complimented for recognizing the privacy needs of its citizens.

While the court is tempted to adopt the argument of the plaintiffs regarding the federally protected right of privacy, the invitation is respectfully declined. The court does not believe that the constitutional right to privacy under the Fourteenth Amendment to the United States Constitution has evolved to the extent that a trial court of general jurisdiction can comfortably interpret it to reach the autopsy photographs here. The court does, however, recognize that such an interpretation is logically consistent with both existing precedent and the needs of the public and agrees in spirit with courts that have found their way to such a resolution. *See Florida v. Rolling,* 1994 WL 722891; 22 Med. L. Reporter 2264 (Fla. 8th Cir., No. 91-3832; July 27, 1004 [sic]). Better in this instance that the appellate court reach such a conclusion than a trial court capable of resolving the question on different grounds.

Accordingly, it is

ORDERED AND ADJUDGED that Chapter 2001-1 is a constitutionally valid enactment and may be properly given retroactive application. The legislature made abundantly clear its mandate that the statute shall be applied retroactively to requests for access made prior to its effective date. The court finds Chapter 2001-1 to be remedial and, therefore, concludes that the statute must be retroactively applied to the requests for the subject autopsy photographs. It is further

ORDERED AND ADJUDGED that the parties seeking examination and/or copying of the autopsy photographs have failed to satisfy their burden to demonstrate good cause as imposed by Chapter 2001-1, on a factual basis, and that the plaintiffs have overwhelmingly prevailed in the application of the balancing standard imposed by the statute. Judgment is hereby entered in favor of Teresa Earnhardt, Taylor Earnhardt, Dale Earnhardt, Jr., the State of Florida, Office of the Solicitor General, and the County of Volusia against the interveners, Michael Uribe and Campus Communications, Inc., with respect to the permanent injunction sought to enjoin access to the autopsy photographs of Dale Earnhardt and the declaratory relief sought. The County of Volusia is hereby permanently enjoined from permitting the examination or copying of the autopsy photographs of Dale Earnhardt by Michael Uribe and Campus Communications, Inc. The court declines to create any restrictions or stipulations under the statute for the viewing or copying of the autopsy photographs in view of the ruling herein that there shall be no disclosure of any degree whatsoever. This judgment does not favor Dale Earnhardt, Inc., in that Chapter 2001-1 does not protect a corporation from release of autopsy photographs. It is further

ORDERED AND ADJUDGED that the parties to the mediated settlement agreement shall be bound by their agreement and the court shall retain jurisdiction for the enforcement of that agreement in the event it becomes necessary. That agreement is not binding upon those who did not sign or otherwise agree to it. It is further

ORDERED AND ADJUDGED that the temporary injunction entered on February 20, 2001, is hereby dissolved and the bond posted by the plaintiffs is hereby released. It is further

ORDERED AND ADJUDGED that the County of Volusia has acted legally in all respects in the course of the present dispute. It is further

ORDERED AND ADJUDGED that the court shall reserve jurisdiction for the determination and assessment of costs and attorney's fees and for the enforcement of the present judgment, as necessary.

DONE and ORDERED in Daytona Beach, Volusia County, Florida, this 9th day of July, 2001.

/s/ Joseph G. Will
Joseph G. Will
Circuit Judge

CERTIFICATE OF SERVICE

True copies of the foregoing have been furnished to the following this 9th day of July, 2001:

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IN THE CIRCUIT COURT,
OF THE SEVENTH JUDICIAL
CIRCUIT, IN AND FOR
VOLUSIA COUNTY, FLORIDA

Case No. 2001-30373-CICI
Division 01
Judge: The Hon. Joseph G. Will

TERESA EARNHARDT and The Estate of DALE EARNHARDT, by and through its personal representative, TERESA EARNHARDT, for and on behalf of The Estate and for the Survivors,

Plaintiffs,

vs.

VOLUSIA COUNTY, OFFICE OF THE MEDICAL EXAMINER,

Defendant.

Order Denying Motion for New Trial

This cause came before the Court on the motion of Campus Communications, Inc. for a new trial on the basis of the court's exclusion of Campus Communications' exhibits 1 through 77. The excluded exhibits consist primarily of newspaper articles.

The Court has considered the motion, the arguments of counsel for the parties, and otherwise has been duly advised. It is ordered and adjudged that the motion

is denied. Done and ordered in chambers at Daytona Beach, Volusia County, Florida.

/s/ Joseph G. Will 7/26/01
Joseph G. Will
Circuit Judge

Copies furnished to
all counsel of record.

Supreme Court of Florida

TUESDAY, JULY 1, 2003

CASE NO.: SC02-1635
Lower Tribunal No.: 5D01-2419

CAMPUS COMMUNICATIONS, INC.	vs. TERESA EARNHARDT, ET AL.
Petitioner(s)	Respondent(s)

This cause having heretofore been submitted to the court on Certified Great Public Importance pursuant to Article V, Section 3(b), Florida Constitution (1980), and Florida Rule of Appellate Procedure 9.030(a)(2)(A)(v), and the Court having determined that it should decline to exercise jurisdiction, it is ordered that the Petition for Review is denied.

No Motion for Rehearing will be entertained by the Court. *See* Fla. R. App. P. 9.330(d).

LEWIS, QUINCE, CANTERO and BELL, JJ., concur.
ANSTEAD, C.J., WELLS and PARIENTE, JJ., dissent.

A True Copy Test:

/s/ Thomas D. Hall [SEAL]
Thomas D. Hall
Clerk, Supreme Court

bh
Served:

HON. FRANK J. HABERSHAW, CLERK
LUCY DALGLISH
BRUCE D. BROWN
BRUCE W. SANFORD
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D. PATRICIA WALLACE
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PARKER D. THOMSON
THOMAS E. WARNER
JUDSON GRAVES
HON. JOSEPH G. WILL, JUDGE
SANDRA K. WOLKOV
HON. DIANE M. MATOUSEK, CLERK
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TIMOTHY EDD MCLENDON

CONSTITUTIONAL PROVISIONS & STATUTES INVOLVED

United States Constitution

Amendment I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

Amendment XIV, Section 1

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Laws of Florida

Chapter 2001-1 (codified as Section 406.135, Florida Statutes)

An act relating to public records; providing an exemption from the public records law for photographs and video and audio recordings of an autopsy; providing an exemption for certain members of the immediate family, or a representative thereof, or a state or federal agency; prohibiting the

custodian of a photograph or video or audio recording of an autopsy from permitting any person to view or duplicate a photograph or video or audio, except pursuant to court order and under the direct supervision of the custodian or his or her designee; exempting criminal and administrative proceedings from the act; requiring certain persons to be parties in a request for access to a photograph or video or audio recording of an autopsy; providing penalties; providing for future legislative review and repeal; providing a finding of public necessity; providing a retroactive effective date.

Be It Enacted by the Legislature of the State of Florida:

Section 1. (1) A photograph or video or audio recording of an autopsy in the custody of a medical examiner is confidential and exempt from the requirements of section 119.07(1) and s. 24(a), Art. I of the State Constitution, except that a surviving spouse may view and copy a photograph or video or listen to or copy an audio recording of the deceased spouse's autopsy. If there is no surviving spouse, then the surviving parents shall have access to such records. If there is no surviving spouse or parent, then an adult child shall have access to such records. A local governmental entity, or a state or federal agency, in furtherance of its official duties, pursuant to a written request, may view or copy a photograph or video or may listen to or copy an audio recording of an autopsy, and unless otherwise required in the performance of their duties, the identity of the deceased shall remain confidential and exempt. The custodian of the record, or his or her designee, may not permit any other person to view or copy such photograph or video recording or listen to or copy an audio recording without a court order. For the purposes of this section, the term "medical examiner" means any

district medical examiner, associate medical examiner, or substitute medical examiner acting pursuant to ch. 406, as well as any employee, deputy, or agent of a medical examiner or any other person who may obtain possession of a photograph or audio or video recording of an autopsy in the course of assisting a medical examiner in the performance of his or her official duties.

(2)(a) The court, upon a showing of good cause, may issue an order authorizing any person to view or copy a photograph or video recording of an autopsy or to listen to or copy an audio recording of an autopsy and may prescribe any restrictions or stipulations that the court deems appropriate. In determining good cause, the court shall consider whether such disclosure is necessary for the public evaluation of governmental performance; the seriousness of the intrusion into the family's right to privacy and whether such disclosure is the least intrusive means available; and the availability of similar information in other public records, regardless of form. In all cases, the viewing, copying, listening to or other handling of a photograph or video or audio recording of an autopsy must be under the direct supervision of the custodian of the record or his or her designee.

(2)(b) A surviving spouse shall be given reasonable notice of a petition filed with the court to view or copy a photograph or video recording of an autopsy or a petition to listen to or copy an audio recording, a copy of such petition, and reasonable notice of the opportunity to be present and heard at any hearing on the matter. If there is no surviving spouse, then such notice must be given to the deceased's parents, and if the deceased has no living parent, then to the adult children of the deceased.

(3)(a) Any custodian of a photograph or video or audio recording of an autopsy who willfully and knowingly violates this section commits a felony of the third degree, punishable as provided in section 775.082, section 775.083, or section 775.084, Florida Statutes.

(b) Any person who willfully and knowingly violates a court order issued pursuant to this section commits a felony of the third degree, punishable as provided in section 775.082, section 775.083, or section 775.084, Florida Statutes.

(c) A criminal or administrative proceeding is exempt from this section, but unless otherwise exempted, is subject to all other provisions of Chapter 119, Florida Statutes, provided however that this section does not prohibit a court in a criminal or administrative proceeding upon good cause shown from restricting or otherwise controlling the disclosure of an autopsy, crime-scene, or similar photograph or video or audio recordings in the manner prescribed herein.

(4) This exemption shall be given retroactive application.

(5) The exemption in this section is subject to the Open Government Sunset Review Act of 1995 in accordance with section 119.15, Florida Statutes, and shall stand repealed on October 2, 2006, unless reviewed and saved from repeal through reenactment by the Legislature.

Section 2. The Legislature finds that it is a public necessity that photographs and video and audio recordings of an autopsy be made confidential and exempt from the requirements of section 119.07(1), Florida Statutes, and Section 24(a) of Article I of the State Constitution. The

Legislature finds that photographs or video or audio recordings of an autopsy depict or describe the deceased in graphic and often disturbing fashion. Such photographs or video or audio recordings may depict or describe the deceased nude, bruised, bloodied, broken, with bullet or other wounds, cut open, dismembered, or decapitated. As such, photographs or video or audio recordings of an autopsy are highly sensitive depictions or descriptions of the deceased which, if heard, viewed, copied or publicized, could result in trauma, sorrow, humiliation, or emotional injury to the immediate family of the deceased, as well as injury to the memory of the deceased. The Legislature notes that the existence of the World Wide Web and the proliferation of personal computers throughout the world encourages and promotes the wide dissemination of photographs and video and audio recordings 24 hours a day and that widespread unauthorized dissemination of autopsy photographs and video and audio recordings would subject the immediate family of the deceased to continuous injury. The Legislature further notes that there continue to be other types of available information, such as the autopsy report, which are less intrusive and injurious to the immediate family members of the deceased and which continue to provide for public oversight. The Legislature further finds that the exemption provided in this act should be given retroactive application because it is remedial in nature.

Section 3. This act shall take effect upon becoming a law, and shall apply to all photographs or video or audio recordings of an autopsy, regardless of whether the autopsy was performed before or after the effective date of the act.

Approved by the Governor March 29, 2001. Filed in Office Secretary of State March 29, 2001.

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Supreme Court, U.S.
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In The
Supreme Court of the United States

CAMPUS COMMUNICATIONS, INC.,

Petitioner,

v.

TERESA EARNHARDT, THE ESTATE OF DALE EARNHARDT, DALE EARNHARDT, JR., TAYLOR EARNHARDT, DALE EARNHARDT, INCORPORATED, COUNTY OF VOLUSIA, OFFICE OF THE MEDICAL EXAMINER, THE STATE OF FLORIDA, AND MICHAEL URIBE,

Respondents.

On Petition For A Writ Of Certiorari To The District Court Of Appeal Of Florida, Fifth District

APPENDIX TO RESPONSE TO PETITION FOR A WRIT OF CERTIORARI OF TERESA EARNHARDT, THE ESTATE OF DALE EARNHARDT, DALE EARNHARDT, JR., TAYLOR EARNHARDT AND DALE EARNHARDT, INCORPORATED

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R. App. 1

IN THE
DISTRICT COURT OF APPEAL OF FLORIDA
FIFTH DISTRICT

Case No. 5D01-2419

CAMPUS COMMUNICATIONS, INC.,
a Florida corporation, Appellant/Cross-Appellees,

vs.

TERESA EARNHARDT and THE ESTATE OF DALE EARNHARDT, Appellees/Cross-Appellants, and DALE EARNHARDT, JR., TAYLOR EARNHARDT, EARNHARDT, INCORPORATED, COUNTY OF VOLUSIA, OFFICE OF THE MEDICAL EXAMINER, THE STATE OF FLORIDA, and MICHAEL URIBE, Appellees.

On Appeal from the Circuit Court of the Seventh Judicial Circuit in and for Volusia County, Florida

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Initial Brief of Campus Communications, Inc.

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INTRODUCTION

After a three-day bench trial, the court below entered a lengthy order that did not cite a single appellate decision, but that did express strong sentiments regarding privacy rights. On the basis of those sentiments and a law passed specifically to affect this litigation, the court dismissed a complaint to enforce the Public Records Law and ordered the records at issue permanently sealed.

That order should be reversed because the Florida Legislature may not destroy substantive rights through

retroactive legislation; the Florida Legislature may not create exemptions to the Public Records Law that are broader than necessary to serve the purpose of the exemption; and neither the Florida nor the United States Constitution guaranty anyone the right to stop a public official from complying with the Public Records Law.

STATEMENT OF THE CASE AND THE FACTS

Dale Earnhardt, one of the most famous racecar drivers in history, died in a crash in the final lap of the Daytona 500 on Sunday, February 18, 2001. (R. 1670-1696 ¶ 75).

In accordance with chapter 406, Florida Statutes, an agent of the medical examiner of the Seventh District in and for Volusia County, Florida, conducted an autopsy on Earnhardt on Monday, February 19, 2001. (R. 1670-1696 ¶ 92).

Teresa Earnhardt commenced this action on Thursday, February 22, 2001, seeking a temporary and permanent injunction to stop Thomas Beaver, the medical examiner for Volusia County, Florida, from making photographs of the autopsy available to the public and the press. (R.290-301). The Court entered an ex parte temporary injunction on the date that the lawsuit was filed. (R-302-04).

After the *Orlando Sentinel* appeared in the action on March 2, 2001, to oppose sealing of the records (R.315-17, 550-56), and other members of the Earnhardt family and Dale Earnhardt, Inc. (referred to collectively with Teresa Earnhardt as "the Earnhardts") appeared to support

sealing the records (R.347-49), the Court referred the matter to mediation. (R.750-51).

As the mediation was coming to a conclusion on March 16, 2001, Campus Communications, Inc., publisher of *The Independent Florida Alligator*, a newspaper in Gainesville, Florida, submitted a motion to intervene to seek dissolution of the temporary injunction and dismissal of or summary judgment against the complaint. The motion alleged that Campus Communications had asked that it be allowed to inspect and copy the autopsy photographs and that the medical examiner had hot complied with the request. (R.771-803). Campus Communications had not participated in the mediation.

On that same day, March 16, 2001, the parties who had participated in the settlement – the *Sentinel*, additional intervening members of the press (R.755-58), the medical examiner, and the Earnhardts – announced that they had reached an agreement whereby the mediator would appoint an independent expert to review the photographs and audiotapes and would report his findings. (R.766-69). The agreement further provided that after the appointed expert examined the materials at issue they would be permanently sealed. (R.766-69).

The circuit court approved the settlement on March 19, 2001. (R.770).

Ten days later, on March 29, 2001, the Florida Legislature amended the Public Records Law to create an exemption to the Public Records Law for autopsy photographs. Chapter 2001-1, provided in its entirety:

> An act relating to public records; providing an exemption from the public

records law for photographs and video and audio recordings of an autopsy; providing an exemption for certain members of the immediate family, or a representative thereof, or a state or federal agency; prohibiting the custodian of a photograph or video or audio recording of an autopsy from permitting any person to view or duplicate a photograph or video or audio, except pursuant to court order and under the direct supervision of the custodian or his or her designee; exempting criminal and administrative proceedings from the act; requiring certain persons to be parties in a request for access to a photograph or video or audio recording of an autopsy; providing penalties; providing for future legislative review and repeal; providing a finding of public necessity; providing a retroactive effective date.

Be It Enacted by the Legislature of the State of Florida:

Section 1. (1) A photograph or video or audio recording of an autopsy in the custody of a medical examiner is confidential and exempt from the requirements of section 119.07(1) and s. 24(a), Art. I of the State Constitution, except that a surviving spouse may view and copy a photograph or video or listen to or copy an audio recording of the deceased spouse's autopsy. If there is no surviving spouse, then the surviving parents shall have access to such records. If there is no surviving spouse or parent, then an adult child shall have access to such records. A local

governmental entity, or a state or federal agency, in furtherance of its official duties, pursuant to a written request, may view or copy a photograph or video or may listen to or copy an audio recording of an autopsy, and unless otherwise required in the performance of their duties, the identity of the deceased shall remain confidential and exempt. The custodian of the record, or his or her designee, may not permit any other person to view or copy such photograph or video recording or listen to or copy an audio recording without a court order. For the purposes of this section, the term "medical examiner" means any district medical examiner, associate medical examiner, or substitute medical examiner acting pursuant to ch. 406, as well as any employee, deputy, or agent of a medical examiner or any other person who may obtain possession of a photograph or audio or video recording of an autopsy in the course of assisting a medical examiner in the performance of his or her official duties.

(2)(a) The court, upon a showing of good cause, may issue an order authorizing any person to view or copy a photograph or video recording of an autopsy or to listen to or copy an audio recording of an autopsy and may prescribe any restrictions or stipulations that the court deems appropriate. In determining good cause, the court shall consider whether such disclosure is necessary for the public evaluation of governmental performance; the seriousness of the intrusion into the family's right to privacy and whether such disclosure is the least intrusive means available; and the availability of similar information in other public records, regardless of form. In all cases, the viewing, copying, listening to or other handling of a photograph or video or

audio recording of an autopsy must be under the direct supervision of the custodian of the record or his or her designee.

(2)(b) A surviving spouse shall be given reasonable notice of a petition filed with the court to view or copy a photograph or video recording of an autopsy or a petition to listen to or copy an audio recording, a copy of such petition, and reasonable notice of the opportunity to be present and heard at any hearing on the matter. If there is no surviving spouse, then such notice must be given to the deceased's parents, and if the deceased has no living parent, then to the adult children of the deceased.

(3)(a) Any custodian of a photograph or video or audio recording of an autopsy who willfully and knowingly violates this section commits a felony of the third degree, punishable as provided in section 775.082, section 775.083, or section 775.084, Florida Statutes.

(b) Any person who willfully and knowingly violates a court order issued pursuant to this section commits a felony of the third degree, punishable as provided in section 775.082, section 775.083, or section 775.084, Florida Statutes.

(c) A criminal or administrative proceeding is exempt from this section, but unless otherwise exempted, is subject to all other provisions of Chapter 119, Florida Statutes, provided however that this section does not prohibit a court in a criminal or administrative proceeding upon good cause shown from restricting or otherwise controlling the disclosure of an autopsy, crime-scene, or similar photograph or video or audio recordings in the manner prescribed herein.

(4) his exemption shall be given retroactive application.

(5) The exemption in this section is subject to the Open Government Sunset Review Act of 1995 in accordance with section 119.15, Florida Statutes, and shall stand repealed on October 2, 2006, unless reviewed and saved from repeal through reenactment by the Legislature.

Section 2. The Legislature finds that it is a public necessity that photographs and video and audio recordings of an autopsy be made confidential and exempt from the requirements of section 119.07(1), Florida Statutes, and Section 24(a) of Article I of the State Constitution. The Legislature finds that photographs or video or audio recordings of an autopsy depict or describe the deceased in graphic and often disturbing fashion. Such photographs or video or audio recordings may depict or describe the deceased nude, bruised, bloodied, broken, with bullet or other wounds, cut open, dismembered, or decapitated. As such, photographs or video or audio recordings of an autopsy are highly sensitive depictions or descriptions of the deceased which, if heard, viewed, copied or publicized, could result in trauma, sorrow, humiliation, or emotional injury to the immediate family of the deceased, as well as injury to the memory of the deceased. The Legislature notes that the existence of the World Wide Web and the proliferation of personal computers throughout the world encourages and promotes the wide dissemination of photographs and video and audio recordings 24 hours a day and that widespread unauthorized dissemination of autopsy photographs and video and audio recordings would subject the immediate family of

the deceased to continuous injury. The Legislature further notes that there continue to be other types of available information, such as the autopsy report, which are less intrusive and injurious to the immediate family members of the deceased and which continue to provide for public oversight. The Legislature further finds that the exemption provided in this act should be given retroactive application because it is remedial in nature.

Section 3. This act shall take effect upon becoming a law, and shall apply to all photographs or video or audio recordings of an autopsy, regardless of whether the autopsy was performed before or after the effective date of the act.

Approved by the Governor March 29, 2001.

Filed in Office Secretary of State March 29, 2001.

On April 3, 2001, Campus Communications filed supplemental materials in support of its motion to intervene showing that autopsy photographs historically have played a critical role in press reports about murders, medical malpractice, prison deaths and numerous other public controversies. (R. 1163-1311). In some instances, the press had found that medical examiners themselves have made serious errors in determining the cause of death or have themselves engaged in wrongdoing or questionable practices. (R. 1163-1311 & Exs. 5-7, 9-10, 13, 15-17, 19, 22-51). The supplemental materials also demonstrated that the cause of Earnhardt's death had become a public controversy and that the photographs sought were relevant to that controversy. (R. 1163-1311 & Exs. 2, 4 & 8).

On April 5, 2001, the circuit court granted Campus Communications' motion to intervene. (R.1334). On April

16, 2001, Campus Communications filed a cross-claim against the medical examiner seeking an order under the Public Records Law requiring him to allow inspection and copying of the Earnhardt autopsy photographs. (R.1359-75). The claim asserted that Chapter 2001-1 could not be applied retroactively to this case and, in any event, that the exemption was broader than necessary to serve the purpose for which it had been enacted.

The State of Florida intervened to defend the constitutionality of Chapter 2001-1. (R.1376-79).

The medical examiner answered Campus Communications' complaint on May 2, 2001, admitting that the records sought by Campus Communications were public records and that they were not exempt from the disclosure requirements of that law at the time that they had been requested, but asserting that he had been prevented from allowing access to the records by the temporary injunction that had been entered by the circuit court. (R.1415-17).

The State answered the complaint on May 9, 2001, asserting that the Chapter 2001-1 was constitutional. (R.1452-54). The State took no position regarding the constitutionality of the Public Records Law prior to its amendment even though the Earnhardts contended in their complaint that the law invaded their state and federal constitutional rights.

The Court set the case for a bench trial to begin on June 11, 2001.

During the first day of the trial, the Court heard testimony from Thomas Beaver, the Volusia County medical examiner. Dr. Beaver testified that "it's important that we, as a society, know why people die, because . . . it

helps us to identify risks to the society as a whole." (T. 200). He testified that historically his office had treated autopsy reports, including autopsy photographs, as public records and had released the reports and photographs upon the request of any member of the public for inspection and copying. (T. 202 & R. 1670-1696 ¶ 35).

He testified that he did not follow that practice in this case because of the temporary injunction entered by the circuit court. (T. 223).

In admissions filed with the Court, Dr. Beaver also testified that as medical examiner for the Seventh District, he is responsible for investigating all deaths resulting from homicide, accidents or in sudden unexpected circumstances, that he oversees about 650 autopsies annually, and that his office has a staff of approximately 11 and an annual budget of approximately $1.1 million. (R. 1670-1696 ¶¶ 27, 28 & 32).

Prior to this lawsuit, when a member of the public had asked to inspect or copy the autopsy records relating to a specific deceased person, that member of the public would be allowed to inspect and copy all autopsy records relating to the deceased person, including autopsy photographs, videotapes, and audiotapes. (R. 1670-1696 ¶ 38). More than 50 members of the public had inspected and copied autopsy records maintained by Beaver within the 12-month period preceding February 22, 2001. (R. 1670-1696 ¶¶ 39 & 40). Beaver did not have a policy of requiring notification of relatives of a deceased person before allowing such access (R. 1670-1696 ¶ 41) and rarely was such notification given. (R. 1670-1696 ¶ 42).

Prior to this litigation, individuals who had copied autopsy photographs had not used them for harmful

purposes (R. 1670-1696 ¶ 43) and no one had ever asked Beaver to deny members of the public the opportunity to inspect or copy autopsy photographs, videotapes, or audiotapes of a deceased person. (R. 1670-1696 ¶ 44).

Individuals who previously had asked for and obtained access to autopsy photographs included reporters, privately-employed medical doctors, privately-employed pathologists, privately-employed investigators, educators, medical researchers, sociologists, and acquaintances and relatives of the deceased (R. 1670-1696 ¶ 45) and these individuals sometimes expressed disagreement with the conclusions of the medical examiner regarding the cause of death after they reviewed the photographs. (R. 1670-1696 ¶ 48). Beaver himself had worked as a consultant in civil and criminal litigation and found it essential to review any autopsy photographs for that purpose. "[T]he first thing I ask the attorney for are the pictures," he testified. (T. 235).

Medical examiners are not the only public officials who take photographs of deceased persons, according to Beaver. Photographs of the deceased are also taken by law enforcement officials in some cases (R. 1670-1696 ¶ 53), although that was not done in the instant case. Those photographs are not kept the custody of the medical examiner, they are kept by law enforcement agencies. (R. 1670-1696 ¶ 54).

Medical examiners also sometimes take photographs of deceased persons other than autopsy photographs. For example, they take photographs at the scene of an accident or before an autopsy is commenced. (R. 1670-1696 ¶ 55, 56 & 58). Such photographs are not autopsy photographs. (R. 1670-1696 ¶ 59).

Autopsy photographs historically have been used for a wide variety of purposes. Beaver himself has given lectures on autopsies or autopsy investigations (R. 1670-1696 ¶ 64) and he has displayed photographs of autopsies for educational or training purposes to law enforcement officials, medical students, physicians, forensic pathologists, paramedics, and nurses. (R. 1670-1696 ¶ 65). He also has shown autopsy photographs to other medical examiners or pathologists for the purpose of seeking a second opinion (R. 1670-1696 ¶ 66) and to consultants for the purpose of seeking an expert opinion. (R. 1670-1696 ¶ 67).

In addition to providing the Court with background regarding the historical treatment and use of autopsy photographs, Beaver also explained the events leading up to this litigation. In his admissions, he acknowledged that in the week before Earnhardt died, the *Orlando Sentinel* had published a series of investigative news reports that were highly critical of the National Association for Stock Car Auto Racing, Inc. ("NASCAR"), sponsor of the Daytona 500, for failing to require head and neck restraint systems that could prevent basilar skull injuries in high speed crashes. The articles pointed out that three NASCAR drivers had died in NASCAR races in the previous nine months of head and neck injuries. The articles reported that other racing organizations had required the use of head and neck restraint systems to prevent such injuries.[1]

[1] Specifically, on February 11, 2001, the *Orlando Sentinel* published an article entitled "NASCAR idles while drivers die." (R. 1670-1696 ¶¶ 68 & 69 and attachments). On February 13, 2001, the *Orlando Sentinel* published an article entitled "Safety slow to arrive despite race carnage." The same day, the *Orlando Sentinel* published an article

(Continued on following page)

Immediately after Earnhardt's death on February 18, 2001, Dr. Steve Bohannon, director of emergency medical services for the International Speedway Corporation, reported to the press that Earnhardt had died of a basilar skull injury – precisely the same type of injury that had killed the three NASCAR drivers that had been the subject of the *Orlando Sentinel's* critical reports. (T. 354). Bohannon reiterated his conclusion at a press conference the following day. (T. 354). To confirm Bohannon's conclusions, reporters requested records from the medical examiner concerning the autopsy of Earnhardt. (R. 1670-1696 ¶ 104). They did not initially, however, request photographs of the autopsy. (R. 1670-1696 ¶ 105).

On Wednesday, February 21, 2001, however, Bohannon, asked the medical examiner's staff to allow him to inspect the photographs of the autopsy of Dale Earnhardt. (R. 1670-1696 ¶ 117) (T. 353 & 361). The medical examiner, consistent with his prior practices, did not advise any relatives of Earnhardt of this request (R. 1670-1696 ¶ 118) and allowed Bohannon's inspection to go forward. (R. 1670-1696 ¶ 119-121). Bohannon was unable to determine from his inspection of the photographs whether Earnhardt's fatal injury had been caused by inertial head-whipping that could have been stopped by a head and neck restraint, seat belt failure, or some other cause. (T. 365).

After examining the photographs that day, Bohannon reported the results of his inspection to Mike Helton, the

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entitled "NASCAR drivers want own medical staff." (R. 1670-1696 ¶ 70).

president of NASCAR. (T. 366). Helton told Bohannon that Earnhardt's seatbelt had failed. (T. 365-66).

On Thursday, February 22, 2001, Teresa Earnhardt filed this lawsuit against the medical examiner (R. 1670-1696 ¶ 127) even though no reporter had requested access to or copies of photographs of the body of Dale Earnhardt during or before the autopsy. (R. 1670-1696 ¶ 128). On the same day that the suit was filed, the circuit court entered a preliminary injunction prohibiting release of the photographs. (R. 302-04).

On Friday, February 23, 2001, NASCAR sponsor of the Daytona 500, held a press conference in Rockingham, North Carolina, at which they announced that Earnhardt's seat belt had failed and that they did not know why. (R. 1670-1696 ¶ 130) (T. 369). Bohannon attended the press conference and expressed the opinion that the failure of the seat belt could have been the mechanism that caused the injury that caused Earnhardt's death. (T. 369).

After the NASCAR press conference of February 23, 2001, reporters for the first time requested access to photographs of the Dale Earnhardt autopsy. (R. 1670-1696 ¶ 132). The autopsy photographs would show the cause of Dale Earnhardt's death. (R. 1670-1696 ¶ 137). The mediation ordered by the circuit court between the Earnhardts, the *Orlando Sentinel* and other media (not including Campus Communications) resulted in an agreement between the mediating parties (R.766-69) that the mediator would appoint an independent expert to examine the photographs for no more than 30 minutes and then issue a report concerning the cause of Earnhardt's death. Pursuant to the agreement, the report would be filed with the Court and the photographs then would be "totally and

permanently sealed in the most secure manner possible." (R. 768).

On or about March 26, 2001, Dr. Barry Myers reviewed the autopsy of Dale Earnhardt, including the photographs of the autopsy. (R. 1670-1696 ¶ 138). He then issued a report on April 9, 2001, expressing his opinions regarding the cause of Earnhardt's death. (R. 1345-58).

The Myers' report did not, however, put an end to the controversy concerning either the cause of Earnhardt's death or whether NASCAR had tried to deflect criticism of its safety requirements. Instead, with the photographs still under seal, the report simply fueled further debate in the national press.[2] (R. 1941-82 Exs. 62-77 & 2395-2404). The circuit court held that press reports concerning the controversies surrounding Earnhardt's death were irrelevant to the issues before him and he excluded them from evidence. (R. 275).

At the conclusion of the first day of the trial, the circuit court announced that he had found "that the legislative enactment of Chapter 2001-1 was a valid and constitutional exercise of legislative authority, pursuant to Article 1, Section 24, of the Florida Constitution." (R. 281).

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[2] For example, on April 30, 2001, the *San Diego Union-Tribune* reported: "NASCAR disputes Earnhardt story." On May 1, 2001, the *Wisconsin State Journal* reported: "Earnhardt's son still believes seat belt broke." Also on the same day, *The Dallas Morning News* reported: "Woman's comments help Earnhardt seatbelt debate intensify." The following day, May 2, 2001, MSNBC headlined a report: "NASCAR knows the truth behind death." A day after that, May 3, 2001, *USA Today* reported: "Earnhardt Jr. confident in NASCAR's probe." Also on that day, *NASCAR Scene Plus* reported: "NASCAR's credibility is being shredded by 'Beltgate.'" (R. 1941-82 Exs. 62, 63, 64, 65, 66, 68 & 69).

The trial court then invited Campus Communications to attempt to show that it had "good cause" for obtaining access to the photographs pursuant to the standards set forth in Chapter 2001-1. (R. 281).

In response to that invitation, Campus Communications offered testimony of Daytona Beach Police Department Sgt. Thomas Youngman, a police photographer (T. 323-51), Dr. Steve Bohannon (T. 352-99), and Teresa Earnhardt (T. 406-82). Collectively, this testimony showed that autopsy that the Earnhardt autopsy photographs already had been made available to Bohannon and to Myers, that access to the photographs was relevant and important to resolution of the controversy concerning Earnhardt's death and NASCAR's safety requirements, and that while Mrs. Earnhardt asserted that she would be distressed by anyone having any access to the photographs, that public access would not in fact injure her or others.

Campus Communications also again urged the Court to consider the numerous news reports showing the controversy that existed regarding the cause of Earnhardt's death and NASCAR's assertion that Earnhardt's seat belt failure, rather than its lack of safety requirements, had caused Earnhardt's death. (T. 478-81). The circuit court again declined to consider the news reports and excluded them from evidence. (T. 482).

The circuit court then heard, over a relevance objection by Campus Communications (T. 482-83), testimony from Michelle Bonnett and Beacher Orr, relatives of two NASCAR drivers who also had been killed in crashes at the Daytona International Speedway. (T. 488-531).

After lengthy closing arguments (T. 556-732), the trial judge orally announced a ruling that even though Campus Communications had asked for access to the photographs on March 16, 2001, and the Legislature had not created an exemption for the photographs until March 29, 2001, Campus Communications had no right of access to the photographs other than that provided under the amended law and that Campus Communications had not shown that it was entitled to access under the amended law. (T. 735-40).

He found that any bearing that the photographs might have on NASCAR's safety requirements was irrelevant because "that's a private matter that does not involve the Government at all." (T. 737). He acknowledged that review of the photographs might show that the medical examiner's "office procedures ... could be different ... [a]nd the investigation by the Daytona Beach Police Department" might have been conducted differently, but "these are incredibly thin excuses to invade the serious privacy rights of the family." (T. 738).

The trial judge also rejected the Earnhardts' assertion that they had any state or federal constitutional right to require the sealing of the photographs. "Judgment shall be entered in favor of Campus Communication, Inc. ... on the action pursuant to Article I, Section 23 of the Florida Constitution and the 14th Amendment to the United States Constitution. The temporary injunction shall be dissolved." (T. 741).

Counsel for the Earnhardts then submitted a proposed final judgment that, contrary to the circuit court's oral ruling, not only dismissed Campus Communications' complaint seeking access to the records, but also entered a

permanent injunction sealing the records. Campus Communications objected to the proposed final judgment. (R. 2432-68). The trial judge nevertheless entered the judgment in the form submitted by the Earnhardts' counsel (R. 2469-81), contradicting his own oral ruling.

Campus Communications moved for a new trial based on the trial judge's exclusion of news reports showing that the records sought were relevant to an important public controversy.[3] (R. 2486-91). The trial judge denied that motion. (R. 2492).

Thereafter, Campus Communications timely appealed the final judgment. (R. 2493). Teresa Earnhardt and the Estate of Dale Earnhardt cross-appealed, explicitly acknowledging that the trial judge's oral ruling and his written final judgment were at odds and stating that they would like to contest the oral ruling if it were regarded as controlling over the written ruling. (R. 2501).

SUMMARY OF ARGUMENT

Point I – Chapter 2001-1 is Unconstitutional. Chapter 2001-1 is unconstitutional for two reasons: (A) it violates due process by retroactively destroying the right that Campus Communications had to inspect and copy the records at issue at the time that it made its request, (B) it violates article I, section 24 of the Florida Constitution because it is broader than necessary to serve the purpose for which it was enacted. The Legislature could have

[3] The excluded news reports are in the record at R. 934-61 and R. 1941-82.

achieved its objective of preventing widespread dissemination of autopsy photographs on the Internet by allowing inspection of the photographs without copying. The availability of this more narrowly tailored means of achieving the objective invalidates the broad exemption from both inspection and copying requirements.

Point II – The Plaintiffs Have No Constitutional Right to Block Compliance with the Public Records Law. The Florida Supreme Court has repeatedly held that there is no state or federal constitutional right that allows individuals to seek injunctions against public officials to stop them from complying with a requirement of the Public Records Law. For that reason, the trial court's oral ruling rejecting the Earnhardt's request for a permanent injunction was correct and the written final judgment granting the permanent injunction should be reversed.

ARGUMENT

I.

Chapter 2001-1 is Unconstitutional

The trial court erred in holding that Chapter 2001-1 can be applied to deny access to the records at issue. The law is facially unconstitutional in several respects.

A. Chapter 2001-1 May Not be Applied Retroactively.

In *Memorial Hospital-West Volusia, Inc. v. News-Journal Corp.*, 784 So. 2d 438 (Fla. 2001) ("*Memorial Hospital II*"), the Florida Supreme Court affirmed this Court's decision requiring the release of certain hospital records. This Court had concluded that release of those records was required notwithstanding the enactment of

legislation exempting the records from the disclosure of the Public Records Law because the Florida Supreme Court had "reject[ed] the contention that the amended statute should be applied retroactively." *Memorial Hospital-West Volusia, Inc. v. News-Journal Corp.*, 729 So. 2d 373, 384 (Fla. 1999) ("*Memorial Hospital I*"). Upon appeal, this Court interpreted the new legislation as intended to apply retroactively, but held it could not constitutionally be applied retroactively. *News-Journal Corp. v. Memorial Hospital-West Volusia, Inc.*, 695 So. 2d 418 (Fla. 5th DCA 1997).

In its recent decision, the Florida Supreme Court disagreed with this Court's conclusion that the legislature intended to apply the new legislation retroactively. It ruled that no such intention could be found. The Florida Supreme Court therefore had no need to decide whether the Florida Legislature has constitutional authority to enact retroactive Public Records Law exemptions. That decision, however, leaves in place this Court's 1997 *Memorial Hospital* decision which did hold that exemptions cannot constitutionally be applied retroactively. This Court should adhere to that decision.

Not only does this Court's *Memorial Hospital* decision require reversal of the decision below, but so also does a long line of decisions governing substantive rights.[4] In

[4] *See Metro. Dade County v. Chase Fed. Hous. Corp.*, 737 So. 2d 494, 503 (Fla. 1999); *see also Bitterman v. Bitterman*, 714 So. 2d 356, 363 (Fla. 1998) ("Substantive rights cannot be adversely affected by the enactment of legislation once those rights have vested"); *Gupton v. Vill. Key & Saw Shop, Inc.*, 656 So. 2d 475, 477 (Fla. 1995) (a substantive law that interferes with vested rights will not be applied retroactively); *Alamo Rent-a-Car, Inc. v. Mancusi*, 632 So. 2d 1352 (Fla. 1994); *Rupp v.*

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Memorial Hospital II, the Florida Supreme Court reaffirmed its view that the right of access granted by the Public Records Law and article I, section 24 of the Florida Constitution "is a substantive right."[5] Classification of the right of access as substantive is significant because "retroactive abolition of substantive vested rights prohibited by due process considerations."[6]

There can be no doubt but that Campus Communications' substantive right of access to the records at issue vested prior to the March 29, 2001, enactment of chapter 2001-1, because the records came into the public domain on February 19, 2001, the date on which the autopsy was conducted. The Public Records Law operates to "place[ ] the books on the table." *Tribune Co. v. Cannella,* 458 So. 2d 1075, 1078 (Fla. 1984)[7] In addition, Campus

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Bryant, 417 So. 2d 658, 661 (Fla. 1982) ("[D]ue process considerations . . . prohibit retroactive abolition of vested rights") (holding statute expanding public officer immunity could not retroactively abolish "right to seek recovery" asserted in pre-enactment suit); *State Dep't of Transp. v. Knowles*, 402 So. 2d 1155 (Fla. 1981) (holding same statute could not constitutionally diminish a pre-enactment non-final jury award against newly immunized officer).

[5] *See Mem. Hosp.-W. Volusia, Inc. v. News-Journal Corp.*, 784 So. 2d 438, 441 (Fla. 2001) ("*Memorial Hospital II*"); *see also Allen v. Butterworth*, 756 So. 2d 52, 66 (Fla. 2000) (holding legislature "has the authority to define the substantive right to public records" but not the power to regulate "the procedure for public records production in capital cases"); *Henderson v. State*, 745 So. 2d 319, 326 (Fla. 1999) (construing public records law as substantive).

[6] *Chase Fed. Hous. Corp.*, 737 So. 2d at 503.

[7] The law plainly had that impact because Steve Bohannon was allowed to inspect the records on February 21, 2001. The prior release of records to a member of the public undermines the justification for withholding the records from other members of the public. *See, e.g., United States v. Camacho,* 22 Media L. Rep. (BNA) 1845, 1849-50 (S.D.

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Communications requested the records on March 16, thirteen days before enactment of chapter 2001-1. At the time that the request was made, the medical examiner had no statutory basis to deny the request and he asserted no basis to deny the request. The only basis for denying the request was the improvidently granted temporary injunction that the trial judge ultimately vacated. Campus Communications was entitled to production of the records at the time that it made its request. In *Cannella,* the Florida Supreme Court held that delay in the production of public records is antithetical to the purpose of the law. "Delaying inspection . . . is not within the legislative scheme." *Id.* at 1076.

Section 119.11, Florida Statutes, plainly recognizes the immediate vesting of the right to inspect and copy records in its creation of not only a right to seek immediate judicial enforcement of the statute, but also a right to an expedited judicial determination of such a claim. Significantly, Campus Communications' right to inspect and copy the records arose not only under chapter 119, but also under article I, section 24(a), of the Florida Constitution which provides: "Every person has the right to inspect or copy any public record made or received in connection with the official business of any public body, officer, or employee of the state, other persons acting on their behalf, except with respect to records exempted pursuant to this section or specifically made confidential by this Constitution." Article I, section 24(a), adopted in 1992, "elevated

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Fla. 1994) (allowing CNN access to victim photographs where other members of the press previously had access to same photographs) (Marcus, J.).

the public's right to government in the sunshine to constitutional proportions."[8]

Article I, section 24(c) of the Florida Constitution specifies that the right of access "shall be self-executing"[9] Thus, even independent. of the clear and specific mechanism of chapter 119, Campus Communications' right of access to the records at issue would have vested by virtue of the mandate of article I, section 24(a).

That the Legislature may have been contemplating legislation to create an exemption to the disclosure requirements of the Public Records Law and to article section 24(a) at the time that Campus Communications submitted its request could not have prevented Campus Communications' rights from vesting at the time of its request or earlier. To hold otherwise would authorize every public official to withhold public records merely because of the mere possibility that legislation would be passed to exempt the requested record from the law.[10] This could eviscerate the law by authorizing the indefinite withholding of records whenever there was a possibility of new

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[8] *Zorc v. City of Vero Beach,* 722 So. 2d 891, 896 (Fla. 4th DCA 1998) *citing Monroe County v. Pigeon Key Historical Park, Inc.,* 647 So. 2d 857 (Fla. 3d DCA 1967).

[9] A self-executing right "lays down a sufficient rule by means of which the right or purpose which it gives or is intended to accomplish may be determined, enjoyed, or protected without aid of legislative enactment." *Gray v. Bryant,* 125 So. 2d 846, 851 (Fla. 1960).

[10] Because Campus Communications submitted its request for access to records *before* the Legislature acted, the Court need not decide in this case whether a member of the press or public that requested the records *after* the Legislature acted would have a vested substantive right.

legislation. Would the filing of a bill alone be regarded as a sufficient basis for a public records custodian to withhold a record? Would committee action be sufficient? Should courts stop enforcing the law if its repeal is simply advocated? Could a public official be deemed to have violated the law if he or she withheld a record because the law might be amended, but it was not? How long should courts await legislative action? These questions demonstrate that the rule of law must be that a public records custodian may not withhold records once they have been requested even though a prospect exists for the law to change.

Traditional principles governing the determination of whether a statute can, consistent with due process, be applied retroactively, also lead to the conclusion that Campus Communications' right to inspect and copy the photographs, videotapes, and audiotapes vested. "Despite formulations hinging on categories such as 'vested rights' or 'remedies,' it has been suggested that the weighing process by which courts in fact decide whether to sustain the retroactive application of a statute involves three considerations: the strength of the public interest served by the statute, the extent to which the right affected is abrogated, and the nature of the right affected."[11]

The right of access to public records always has been regarded as a paramount value in Florida.[12] It assures government accountability and protects the public and individuals against both negligence and corruption.

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[11] *Knowles,* 402 So. 2d at 1158.

[12] *See generally Shevin v. Byron, Harless, Schaffer, Reid & Assocs.*. 379 So. 2d 633, 640 (Fla. 1980).

Abrogation of the right is complete. Although the legislation creates the possibility that records may be released through a court order in some circumstances,[13] it cannot be denied that in many instances that new law denies access to records that previously had been allowed. Indeed, in this case the Earnhardts successfully argued that Chapter 2001-1 had destroyed Campus Communications' right of access.[14] Finally, the nature of the right affected is

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[13] The criteria specified by the Legislature for allowing access are themselves constitutionally deficient because they invite, if not require, judges to deny access based on the viewpoint of the requester. Even if the state has no constitutional obligation to grant access, see *L.A. Police Dep't v. United Reporting Pub'g Corp.*, 120 S. Ct. 483 (1999), once it decides to grant access, it may not consistent with the First Amendment and Equal Protection Clause deny access to some on the basis of viewpoint. *Cf. Legal Servs. Corp. v. Velazquez*, 121 S. Ct. 1043, 1050 (2001) (government cannot condition subsidies on basis of viewpoint); *Good News Club v. Milford Cent. School*, 121 S. Ct. 2093 (2001) (exclusion of Christian children's club from meeting after hours was unconstitutional viewpoint discrimination); *National Endowment for the Arts v. Finley*, 118 S. Ct. 2168 (1998) (NEA may not "leverage its power to award subsidies on the basis of subjective criteria into a penalty on disfavored viewpoints"); *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819 (1995) (state university may not disburse student activity fees on viewpoint-based terms); *Anderson v. Cryovac*, 805 F.2d 1, 9 (1st Cir. 1986) ("danger in granting favorable [access] to certain members of the media is obvious: it allows the government to influence the type of substantive media coverage that public events will receive"). The court in the instant case expressly grounded its decision denying access, in part, on the viewpoint of the requesters that autopsy photographs under some circumstances should be published. (R. 2469-81 at ¶¶ 15-16) (referencing past and future publications of the requesters as justification for denying access). Both the order and Chapter 2001-1 abridge the First Amendment and deny equal protection by denying on the basis of viewpoint access to records made available to others.

[14] *But see* Point II *infra*. Before enactment of chapter 2001-1, records could be accessed irrespective of the reason for which they were

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fundamental. Through their adoption of article I, section 24 of the Florida Constitution, the people of the State of Florida eliminated any doubt that the Courts should accord their right of access fundamental stature. *Memorial Hospital II,* 784 So. 2d at 481. Today, the right of access to public records is plainly a substantive, vested right that the Legislature cannot, consistent with due process, destroy through retroactive legislation.[15]

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sought. *See Booksmart Enters., Inc. v. Barnes & Noble Coll. Bookstores, Inc.,* 718 So. 2d 227, 228, n.2 (Fla. 3d DCA 1998) ("reason for wanting to view and copy the documents is irrelevant"); *Staton v. McMillan,* 597 So. 2d 940, 941 (Fla. 1st DCA 1992), *review dismissed sub nom., Staton v. Austin,* 605 So. 2d 1266 (Fla. 1992) (reasons for seeking access "are immaterial"); *Lorei v. Smith,* 464 So. 2d 1330, 1332 (Fla. 2d DCA 1985) ("legislative objective ... was to insure ... the right freely to gain access to governmental records. The purpose for such inquiry is immaterial."), *review denied,* 475 So. 2d 695 (Fla. 1985); *News-Press Publishing Co. v. Gadd,* 388 So. 2d 276, 278 (Fla. 2d DCA 1980) ("the newspaper's motives [for seeking the documents], as well as the hospital's financial harm and public harm defenses, are irrelevant in an action to compel compliance with the Public Records Act").

[15] In *City of Orlando v. Desjardins,* 493 So. 2d 1027 (Fla. 1986), the Supreme Court held that the Legislature could apply a "remedial" exemption to the Public Records Law without violating due process. The statute at issue in that case, an exemption for the work product of an agency attorney, unlike the chapter 2001-1, did not impose on requesters of the records a requirement that they show good cause. Instead, that statute, section 119.07(3)(o), Florida Statutes (1984 Supp.), simply *postponed* the time at which a requester could have access to the records until after the conclusion of the litigation. The work product exemption therefore could be classified as "remedial" in nature because it merely delayed the release of the records. By contrast, chapter 2001-1 entirely destroys the right of access unless the requester demonstrates good cause to a court. The requester who refuses to or who cannot demonstrate good cause will have no right at all even though his or her right would have been absolute prior to enactment of chapter 2001-1. *Desjardins* is also distinguishable in that

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B. The Legislature Violated Article I, Section 24 of the Florida Constitution by Enacting Chapter 2001-1

The Florida Legislature violated article I, section 24(c) of the Florida Constitution when it adopted chapter 2001-1 in that the Legislature did not state with specificity the public necessity for the law and the law is broader than necessary to accomplish the stated purpose of the law. Article I, section 24(c) states that to enact an exemption to the disclosure requirements of article I, section 24(a), the Legislature first must "state with specificity the public necessity justifying the exemption" and then must tailor the exemption so that it is "no broader than necessary to accomplish the stated purpose of the law."

The Florida Supreme Court has applied this constitutional provision only once, in *Halifax Hospital Medical Center v. News-Journal Corp.,* 724 So. 2d 567, 569 (Fla. 1999). In that case, the circuit court invalidated an exemption created for "critical confidential information" in the possession of public hospitals. Circuit Judge John V. Doyle held:

> The evidence in this case thus showed and the Court finds that not all aspects of written strategic plans are critical and confidential. . . . By creating an exemption for any and all discussion of

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it was rendered six years before the adoption of article I, section 24, Fla. Const., and well before *Memorial Hospital II,* All substantive rights are protected by due process against retroactive destruction. In *Arrow Air, Inc. v. Walsh,* 645 So. 2d 422 (Fla. 1994), the Court made clear that *Desjardins* does not allow the Legislature to destroy substantive vested rights.

> the strategic plan, the legislature has created a categorical exemption which reaches far more information than necessary to accomplish the purpose of the exemption. All discussion of strategic plans is made secret solely to protect that part of the discussion which pertains to critical confidential information. This is facial overbreadth.

Id. at 570 (quoting the final judgment). The defendant had asked the circuit court to narrow the exemption by defining what constitutes "critical and confidential information," but the circuit court declined that request, holding that "such a finding is fundamentally legislative rather than judicial." *Id.* at 569.

This Court affirmed, agreeing that not all aspects, of written strategic plans are critical and confidential and that it should not attempt to save the statute by a narrowing judicial construction. *Id.* The Court held the statutory exemption "overbroad on its face."

The Florida Supreme Court agreed with this Court that "the statutory exemption does not meet the exacting constitutional standard of article I, section 24(c), of specificity as to stated public necessity and limited breadth to accomplish that purpose and is therefore facially unconstitutional." *Id.*

In response to the defendant's request for a judicial narrowing of the exemption to save it, the Supreme Court acknowledged a statute should be construed so as not to conflict with the constitution, but held that "a court's discretion to adopt a narrowing construction should be exercised with restraint." *Halifax Hospital Medical Center,* 724 So. 2d at 570. The Court held, "we find in this case that we cannot move into the legislature's province by

making the factual determination that would bring this statutory exemption within constitutional boundaries. A court may not have the fact-finding machinery to enable it to authoritatively construe a statute and supply a saving construction." *Id.*

The Court observed: "In this case, we do not have before us the relevant information to define 'critical confidential information' or 'strategic plans' for which disclosure would harm the business interests of the hospital. Moreover, in enacting exemptions to Florida's public disclosure laws, the legislature has an express constitutional obligation to tailor such an exemption so that it is no broader than necessary to accomplish the exemption's stated purpose. Thus, the task of enacting more limited statutory exemption appropriately belongs to the legislature in this case." *Id.*

In applying article I, section 24(c) and the holding of the *Halifax* case to this case, this Court must first examine the articulated "public necessity" that justifies enactment of the exemption. This articulation is found in section 2. It provides, in pertinent part, that "photographs or video or audio recordings of an autopsy depict or describe the deceased in graphic and *often* disturbing fashion." (Emphasis added). It further states "Such photographs or video or audio recordings *may* depict or describe the deceased nude, bruised, bloodied,, broken, with bullet or other wounds, cut open, dismembered, or decapitated." (Emphasis added). It then concludes that "As such, photographs or video or audio recordings of an autopsy are highly sensitive depictions or descriptions of the deceased which, if heard, viewed, copied or publicized, *could* result in trauma, sorrow, humiliation, or emotional injury to the immediate family of the deceased, as well as

injury to the memory of the deceased." Each of these sentences reflects that the Legislature regarded chapter 2001-1 as necessary because access to the materials at issue could, in *some* circumstances, inflict emotional injury on the immediate family of the subject of those materials.

In choosing the word "often" rather than "always," the word "may" rather than "do," and the word "could" rather than "will" or "would," the Legislature explicitly acknowledged that the viewing, copying or publicizing of photographs does not always result in trauma, sorrow, humiliation, or emotional injury.[16] The exemption therefore is overbroad on its face in the same way that the exemption in *Halifax* was overbroad on its face. The Legislature

[16] The Legislature not only has acknowledged through its choice of words that access to autopsy photographs, videotapes, and audiotapes will always not inflict emotional harm, it also has acknowledged that in some circumstances the value of unfettered access to such materials outweighs any risk that emotional harm will be inflicted by the access. It does the latter by stating that "a surviving spouse may view and copy a photograph or video or listen to or copy an audio recording off the deceased spouse's autopsy. If there is no surviving spouse, then the surviving parents shall have access to such records. If there is no surviving spouse or parent, then an adult child shall have access to such records." Presumably the Legislature included this provision because spouses, parents and children often will have a need for such records for insurance and estates purposes. That obviously would not always be the case. In some instances, an individual who is within the exemption – for example, an estranged spouse, parent, or child – might well be the one individual who is *most* likely to misuse the materials to inflict emotional harm on others. In other cases, persons other than those listed in the statute such as non-spousal life partners or non-familial beneficiaries – will have an equally strong, if not greater, interest in access to the records. In its failure to allow these individuals the unfettered access that will be enjoyed by others, the statute is overly broad and in violation of article I, section 24(c)

simply has exempted more records than are necessary to serve the purpose of the exemption.

Section 2 of chapter 2001-1 further observes that "the World Wide Web and the proliferation of personal computers throughout the world encourages and promotes the wide dissemination of photographs and video and audio recordings 24 hours a day and that widespread unauthorized dissemination of autopsy photographs and video and audio recordings *would* subject the immediate family of the deceased to continuous injury," In choosing the word "would" in this sentence, the Legislature perhaps had this specific case in mind. It plainly could not have made that finding with respect to *all* immediate family members of deceased persons because in some instances, immediate family plainly might prefer that the public have the right to inspect, copy, and publish autopsy photographs. For example, when an autopsy photograph would be instrumental in persuading legislators that action should be taken to impose certain safety requirements, family members might be gratified by that use of photographs. Family members also might be gratified by inspection, copying, and publication of autopsy records that leads to the discovery of malpractice or to the uncovering of wrongdoing.[17]

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[17] In *Church of Scientology Flag Service Organization v. Office of the State Attorney of Pinellas County, Florida,* No. 00-4353-C1-13 (Fla. 6th Cir. July 5, 2000) (writ of mandamus and order denying motion for temporary injunction), the circuit court ordered the release of autopsy photographs to the *St. Petersburg Times.* In that case, Ms. McPherson died while in the custody of the Church of Scientology. The *St. Petersburg Times* sought access to the photographs to demonstrate that the

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A further difficulty with the breadth of the new exemption is that inspection alone presents no legally significant risk that the photographs would be published. The Earnhardt family argued below that allowing inspection of photographs would create a risk of publication because of the availability of small cameras used for espionage. This argument proves too much. If one assumes that the public will violate the law to obtain copies of autopsy photos for dissemination, there is no reason to conclude that merely limiting public inspection will be effective. Employees could be bribed and photographs could be stolen whether inspection were allowed or not. The mere possibility that a precaution can be circumvented by illegal activity does not show that a less restrictive precaution (denial of copying) would not be as effective as the most restrictive precaution (denial of all access) to prevent the harm. If the harm to be avoided is publication of autopsy photographs, then the Legislature plainly had available a less restrictive means of achieving that objective than the means that it chose.

The overbreadth of the statute is not saved by the inclusion of a mechanism by which a court can order the disclosure of some autopsy photographs because the legislature has not directed that courts to require disclosure where harm would *not* be caused by inspection, copying, or publication of the photographs. Instead, the legislature has directed courts to order the release of autopsy photographs "upon a showing of good cause." The legislature has done nothing to define "good cause," other

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church had mistreated Ms. McPherson. The church, but not the McPherson family, opposed the release of the records.

than to indicate that "the court shall consider whether such disclosure is necessary for the public evaluation of governmental performance; the seriousness of the intrusion into the family's right to privacy and whether such disclosure is the least intrusive means available; and the availability of similar information in other public records, regardless of form." These criteria do nothing to ensure that a court's discretion will be confined so that it will allow inspection of materials that will not cause the harm that supposedly justifies the exemption. In fact, the statute does not require the court to release materials under any knowable circumstances. Instead, this part of the statute simply transfers legislative powers to the judiciary and recommends factors for the judiciary to consider in making ad hoc determinations of whether ad hoc access will be allowed to particular records.[18]

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[18] This creates yet another constitutional defect in Chapter 2001-1. The Legislature may not delegate the power to enact a law or the right to exercise unrestricted discretion in applying the law. *See Sims v. State,* 754 So. 2d 657 (Fla. 2000); *B.H. v. State,* 645 So. 2d 987, 991-92 (Fla. 1994); *Askew v. Cross Key Waterways,* 372 So. 2d 913, 924 (Fla 1979); *State v. Atl. Coast Line R.R.,* 56 Fla. 617, 47 So. 969 (1908). The Legislature may "enact a law, complete in itself, designed to accomplish a general public purpose, and may expressly authorize designated officials" to administer the law, but only "within definite valid limitations" to allow "operation and enforcement of the law within its expressed general purpose." *Atlantic Coast Line Railroad Co.,* 56 Fla. at 636-37, 47 So. at 976. Chapter 2001-1 does not provide sufficiently definite, valid limitations to allow for the complete operation and enforcement of the exemption. Instead, the legislature has left the courts to determine what constitute "good cause" for the disclosure of the autopsy records at issue and, to the extent that the legislature has provided guidance with respect to that determination, it has done so on the basis of criteria that are impermissibly based on the past or future expression of the requester. The Florida Supreme Court held a

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This type of legislation offends article I, section 24(c) in much the same fashion that the defendants' request for a narrowing construction of the exemption in the *Halifax* case offended article I, section 24(c). "[I]n enacting exemptions to Florida's public disclosure laws, the legislature has an express constitutional obligation to tailor such an exemption so that it is no broader than necessary to accomplish the exemption's stated purpose." *Halifax Hospital Medical Center,* 724 So. 2d at 570. By allowing the judiciary to decide which autopsy records will be exempt, the Legislature has failed to exercise its constitutional duty.

II.

Campus Communications Should Have Been Granted Access Under Chapter 2001-1

In the event that the Court upholds the constitutionality of chapter 2001-1, it then should consider whether the circuit court erred in holding that Campus Communications had not shown good cause under chapter 2001-1 to inspect and copy the photographs. The Court's ruling is based on findings that are not supported by substantial

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similarly imprecise statute regulating speech to be an invalid delegation of legislative authority in *Brown v. State,* 358 So. 2d 16, 20 (Fla. 1978). The statute in that case made it a misdemeanor to use "profane, vulgar and indecent" language in any public place or private premises within the hearing of others. By leaving to the courts the task of giving meaning to these imprecise terms, the legislature had improperly delegated its legislative authority. "The Florida Constitution requires a certain precision defined by the legislature, not legislation articulated by the judiciary." *Id.* at 20.

competent evidence and legal conclusions that are incorrect.

Chapter 2001-1 first suggests that a trial judge should consider whether access to the records is necessary for public evaluation of governmental performance. The circuit court erred as a matter of law interpreting this criterion as narrowly as it did. Access to autopsy reports, including photographs, has been regarded as necessary for such evaluation for many years. The Legislature first enacted the Public Records Law in 1909. 1909 Laws of Florida, chapter 5942, sec. 1. The statute stated: "All state, county, and municipal records shall at all times be open for a personal inspection of any citizen of Florida," No exemption was made for autopsy reports. The law has been amended innumerable times since 1909, but until this year, there was no general exemption for autopsy reports[19]

[19] The Legislature did exempt the autopsy reports of eight county medical examiners in the 1950s and 1960s. See Ch. 27439, 1951, Laws of Florida (Broward County); Chapter 59-1242, Laws of Florida (Duval County); s. 10, Ch. 63-1142, Laws of Florida, (confidentiality of records of Brevard County medical examiner); s. 9, Ch. 59-1381, Laws of Florida, (confidentiality of records of Indian River County medical examiner); s. 12, Ch. 67-1704, Laws of Florida, (Martin County); s. 9, Ch. 1063, 1955 (Orange County); s. 5, Ch. 61-2640, Laws of Florida, (Palm Beach County); s. 9, Ch. 31270, 1955, Laws of Florida (Sarasota County). But in 1970, the Legislature enacted s. 11, Ch. 70-232, Laws of Florida (codified as chapter 406, Florida Statutes), to govern medical examiners generally and it superseded these special acts without including any exemptions for records created by medical examiners. In an informal opinion on August 21, 1974, the Attorney General concluded that autopsy reports are open to public inspection and copying. The Attorney General reiterated this conclusion two years later in a formal opinion, Opinion 76-156. In 1984, a circuit court held that chapter 406 repealed all special laws exempting autopsy records from the inspection and copying requirements of chapter 119, *Palm Beach*

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and for good reason. Access to autopsy reports helped to ensure that the medical examiner did his job correctly and inspired public confidence in conclusions reached by the medical examiner. Both are important objectives because the medical examiner is in many ways the public's first line of defense against criminal activity, product liability, and disease. That official is required to determine the cause of a death that occurs by crime or accident or under any unusual circumstances.[20] The ability to review the medical examiner's work is therefore vital to the public and the press.[21] Closing objective records such as photographs to the public, substantially interferes with the

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Newspapers. Inc. v. Terlizesse, 6 Fla. Supp. 2d 8, 10 (15th Cir. 1984), and ordered production of the autopsy report prepared by the Palm Beach County Medical Examiner in connection with the death of David Kennedy, the son of the late Senator Robert F. Kennedy. The Fourth District Court of Appeal upheld this ruling in *Bludworth v. Palm Beach Newspapers, Inc.,* 476 So. 2d 775 (Fla. 4th DCA 1985).

[20] Autopsies are authorized by the Medical Examiner by section 406.11, Florida Statutes, when any person dies in the state of criminal violence, by accident, by suicide, suddenly, when in apparent good health, unattended by a practicing physician, in prison or a penal institution, in police custody, in any suspicious or unusual circumstance, by criminal abortion, by poison, by disease constituting a threat to public health, by disease, injury, or toxic agent resulting from employment; when a dead body is brought into the state without proper medical certification; or when a body is to be cremated, dissected, or buried at sea.

[21] Reporters regularly have exercised that right to investigate and to report about criminal activities, accidental deaths and other important matters. *See* Carl Hiaasen, *Banning Autopsy Photos is Dangerous,* The Miami Herald (Mar. 11, 2001) ("Many times, deaths that initially were ruled accidents or suicides have later been revealed as homicides. These crimes were uncovered because someone took a fresh look at the case. It might have been a family member or a friend, an insurance investigator or even a journalist.").

public's ability to evaluate the medical examiner's work. It is left solely with the subjective autopsy report and no ability to evaluate its accuracy.

The circuit court acknowledged that access to the records also might help to evaluate NASCAR's safety requirements, but deemed this to be a "private" matter, not involving governmental performance. NASCAR conducts races, however, only with the approval of the government. The Legislature certainly has the power to stop races that regularly result in the deaths of drivers or to condition their continuance on the organizer taking certain safety precautions. The photographs that were sought in this case could help to confirm that Dale Earnhardt's death could have been prevented had certain safety equipment been required by NASCAR. That might lead to legislation to make racing safer.[22]

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[22] Significantly, the Legislature already has adopted laws that are designed to protect race organizers from liability suits arising from the deaths of drivers. *See* Fla. Stat. § 549.09(2) (2001) which provides "[a]ny person who operates a closed-course motorsport facility may require, as a condition of admission to any nonspectator part of such facility, the signing of a liability release form. The persons or entities owning, leasing, or operating the facility or sponsoring or sanctioning the motorsport event shall not be liable to a nonspectator or her or his heirs, representative, or assigns for negligence which proximately causes injury or property damage to the nonspectator area during the period of time covered by the release." Section 540.09(2), Florida Statutes. Without such legislation, race organizers could be sued for ordinary negligence. *See, e.g., Ashcroft v. Calder Race Course, Inc.,* 492 So. 2d 1309 (Fla. 1986). Although the doctrine of "assumption of the risk" tempered the impact of the negligence doctrine in this area, *see, e.g., Gulf Stream Park Racing Ass'n v. Miller,* 119 So. 2d 749 (Fla. 2d DCA 1960), it did not foreclose the possibility of a lawsuit for negligence being filed. In other states, the liability of racetrack owners and race

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The intrusion into the family's right to privacy by inspection and copying of the records cannot be found to invade the family's privacy rights at all because the family would not even be aware of the inspection or copying. The misuse of autopsy photographs *after* they have been inspected and copied can, of course, be tortious. In *Williams v. City of Minneola,* 575 So. 2d 683 (Fla. 5th DCA 1991), this Court reviewed a claim that police officers had violated the rights of the mother and sister of a 14-year-old boy who had died of a drug overdose by gratuitously showing the videotape of the boy's autopsy and by gratuitously displaying autopsy photos in a party atmosphere where the audience was joking and laughing. The Court held that this behavior – not the inspection or copying of the records – could constitute intentional infliction of emotional distress.[23] "One who behaves outrageously with

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promoters and sponsors such as NASCAR has been established in a wide variety of circumstances. *See, e.g., Wolfgang v. Mid-America Motorsports, Inc.,* 111 F.3d 1515 (10th Cir. 1997) (affirming jury verdict for plaintiff in action arising from severe injuries to driver where promoter recklessly disregarded safety risk); *Owen v. R.J.S. Safety Equipment, Inc.,* 591 N.E.2d 1184 (N.Y. 1992) (rejecting assumption of risk defense where spouse of deceased race car driver demonstrated that driver subjected to dangerous conditions above usual dangers inherent in auto racing); *Arnold v. Shawano County,* 317 N.W.2d 161 (Wis. App. 1982) (summary judgment for owner and operator of track reversed); *McCarthy v. NASCAR,* 226 A.2d 713 (N.J. 1967); *Midkiff v. NASCAR,* 82 S.E.2d 417 (N.C. 1954); *see generally* Andrea G. Nadel, Annotation, *Liability for Injury or Death of Participant in Automobile or Horse Race at Public Track,* 13 A.L.R. 4th 623 (1982).

[23] The Court also held that the conduct of the defendants could not constitute a common law invasion of the plaintiffs' privacy. The Court found "two basic problems" with the common law invasion of privacy theory. "First, the publicity given to private facts must be to the public at large or to so many persons that the matter must be regarded as substantially certain to become public knowledge." *Williams,* 575 So. 2d

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regard to pictures of a dead body can be presumed to know that severe emotional distress will be inflicted thereby on those who were closely related to the deceased, should those survivors become aware of the tortfeasor's behavior," the court held. *Id.* at 693. Similar conclusions have been reached in other cases.[24] No case, however, has held that the mere inspection and copying of autopsy records is an invasion of a family's privacy rights.

Another factor that the circuit court should have considered in weighing the request for access was that Earnhardt invited intense public scrutiny of every aspect of his life through his decision to engage in a sport that is extremely dangerous, that regularly results in the deaths of drivers, that attracts millions of fans and television viewers, and that makes millions of dollars for race organizers, participants and sponsors. A family that has invited so much public attention and that has benefited financially and otherwise by such extensive public attention cannot have the same expectation of privacy as individuals who have not engaged in such activities.[25]

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at 689. "Second, an invasion of privacy action of the category here involved can be brought only by a living person whose own privacy is invaded." *Id.*

[24] *See, e.g., Armstrong v. H&C Communications, Inc.*, 575 So. 2d 280 (Fla. 5th DCA 1991) (holding that television stations could be held liable for intentional infliction of emotional distress arising from the broadcasting of videotape of skull of a child shown by medical examiner).

[25] *See generally Bartnicki v. Vopper*, 121 S. Ct. 1753, 1765 (2001) ("One of the costs associated with participation in public affairs is an attendant loss of privacy").

The circuit court should have concluded that allowing inspection and copying of the photographs is the least intrusive means available to satisfy the request for access because less intrusive means, such as the limited access allowed to a court-appointed expert, cannot quell the controversy surrounding Earnhardt's death. The availability of a written autopsy record cannot suffice because it plainly does not contain all of the same information available from photographs. Moreover, even if the photographs showed nothing more than the autopsy report, access to the photographs still would be necessary to confirm this. As shown in the record, autopsy reports often are not accurate and inspection of photographs can demonstrate this.[26]

The circuit court erred as a matter of law in holding that Campus Communications had not shown good cause for seeking inspection and copying of the photographs at issue.

III.

Judgment Should Have Been Entered Against the Earnhardts' Disclosural Privacy Claim

If Chapter 2001-1 is held to be unconstitutional or if the Court holds that Campus Communications was entitled to access under Chapter 2001-1, the Court then should consider the Earnhardt's assertion that they have a

[26] At a minimum, the Court should reverse the trial court's denial of the motion for new trial that was based on the trial court's exclusion of news articles showing the relevance of the photographs to an important public controversy.

constitutional right that supersedes that statutory right of access. The circuit court explicitly ruled against the Earnhardts on this claim in its oral ruling and then in favor of the Earnhardts in its written judgment. Because of the circuit court's vacillation on this issue, it ought not afford any deference to the circuit court. The issue, in any event, is a pure issue of law that may be considered de novo.

The Earnhardts contended below that even if Florida law required the medical examiner to allow public access to the photographs, that they were entitled to enjoin release of the photographs on the basis of rights guarantied them by (A) article I, section 23, Florida Constitution; and (B) the Due Process Clauses of the Fifth and Fourteenth Amendments of the United States Constitution. Neither of these arguments has merit.

A. The State Constitutional Privacy Right Does Not Limit the Public Records Law

The plaintiffs first cite article I, section 23 of the Florida Constitution as authorizing the relief that they request. Article I, section 23, which amended the Constitution on November 4, 1980, provides: "Every natural person has the right to be let alone and free from governmental intrusion into the person's private life except as otherwise construed herein. *This section shall not be construed to limit the public's right of access to public records and meetings as provided by law.*" (Emphasis added). The second sentence of the section "was added to prohibit use of the privacy amendment to impede public

access to public information"[27] "The legislature designed the amendment to control the collection of information rather than disclosure"[28] Thus, "[a]lthough legislative revision of [the Sunshine and Public Records Law] remains possible, the courts are precluded from invalidating or creating exceptions to these laws on the basis of" article I, section 23.[29] In one of the early tests of article I, section 23, *Mills v. Doyle,* 407 So. 2d 348 (Fla. 4th DCA 1981), the Fourth District Court of Appeal adhered to this view. "[B]y its terms," the Court held, "Article I, Section 23, does not limit the public right of access to public records. Therefore, adoption of Article I, Section 23, has no adverse effect on Chapter 119, Florida Statutes." The Florida Supreme Court has repeatedly adhered to this view.[30] Therefore, it is

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[27] R. D. Woodson & Ricki L. Tanner, *Federal Constitutional Privacy & The Florida Public Records Law: Resolving the Conflict,* 33 U. Fla. L. Rev. 313, 337 (1980) (footnotes omitted) (citing Public Administration Clearing Service, *Proposed Amendments to Florida Constitution to be on Ballot on October 7, 1980, & on November 4, 1980 Elections* 17 (1980)).

[28] *Id.* at 337 (footnotes omitted).

[29] Joseph S. Jackson, *Interpreting Florida's New Constitutional Right of Privacy,* 33 U. Fla. L. Rev. 565, 580 (1981); *see also* Gerald B. Cope, *A Quick Look at Florida's New Right of Privacy,* 55 Fla. Bar J. 12, 12-13 (1980).

[30] *See Post-Newsweek Stations, Fla., Inc. v. Doe*, 612 So. 2d 549, 552 (Fla. 1992) (article I, section 23 "has not been interpreted to protect names and addresses contained in public records"); *Michel v. Douglas*, 464 So. 2d 545 (Fla. 1985) (article I, section 23 could not be invoked by employees of public hospital to block access to hospital personnel records that were public records); *Forsberg v. Hous. Auth. of City of Miami*, 455 So. 2d 373 (Fla. 1984) (public housing tenants had no right to enjoin release of information provided by them to public housing authority); *see also Borges v. City of West Palm Beach*, 858 F. Supp. 174, 178 (S.D. Fla. 1994) (recognizing that the Florida Supreme Court has

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very clear that article I, section 23 provides no authority whatsoever for the Earnhardts' request for an injunction.

B. There is No Federal Constitutional Privacy Right that Limits the Public Records Law

The Earnhardts also claimed below that they had a federal constitutional right to block public and press inspection of the photographs. They claimed that "right" emanated from a trio of United States Supreme Court decisions,[31] yet the Florida Supreme Court has held that these cases do not create the claimed federal right. When it first considered the assertion of such a right in *Shevin v. Byron, Harless, Schaffer & Associates,* 379 So. 2d 633 (Fla. 1980), in an attempt to block press access to a consultant's files regarding applicants for a position with a municipal utility, the Court held: "The Supreme Court may some day breathe life into the privacy interest asserted by respondents, but, until that occurs, we conclude that there does not exist, under the facts of this case, a constitutionally protected interest sufficient to prevent the public from seeing the consultant's papers." *Id.* at 638.

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found that article I, section 23 cannot be construed to limit the Public Records Law).

[31] *Paul v. Davis,* 424 U.S. 693 (1976) (rejecting claim that city and county officials violated plaintiffs right of privacy by distributing flyers identifying plaintiff as an active shop lifter); *Whalen v. Roe,* 429 U.S. 589 (1977) (rejecting a claim that disclosural privacy rights would be violated by a centralized computer filing system for medical records maintained by government agency); *Nixon v. Adm'r of Gen. Servs.,* 433 U.S. 425 (1977) (rejecting a claim that archivists' review of tapes made during Nixon presidency to sort out personal matter would violate Nixon's right of privacy).

The Florida Supreme Court subsequently rejected assertions of the supposed federal "right" in a variety of circumstances and in each case it has concluded that no such federal right exists to block access to public records.[32] The Supreme Court's antipathy for the assertion of the "right" to attempt to block or even slow access to public records was made clear in *Cannella.* There, the Court evaluated the constitutionality of a City of Tampa policy that required the delay of the release of police personnel files for three days pending notice to the affected employee. After the trial court upheld the policy, an en banc decision of the Second District Court of Appeal held, 5 to 4, that "government employee personnel files could be automatically withheld for 48 hours, to allow employees an opportunity to raise any claims that the information should be withheld permanently because of privacy interests." 458 So. 2d at 1076-77.

In the Florida Supreme Court, the City and the police officers argued that this decision should be upheld because "an automatic delay is necessary to allow the officers to be present during the inspection of their records, and to allow them to raise any constitutional claim that the records should not be opened for inspection." *Id.* at 1076.

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[32] *See Michel,* 464 So. 2d 545 (employees of public hospital had no federal constitutional right to stop access to hospital personnel records that were public records); *Tribune Co. v. Cannella,* 458 So. 2d 1075 (Fla. 1984) (police officers had no constitutional privacy right to delay production of their personnel files); *Forsberg,* 455 So. 2d 373 (public housing tenants had no right to enjoin release of information provided by them to public housing authority).

A unanimous Supreme Court rejected these arguments, first observing that it previously had held in *Wait v. Florida Power & Light Co.*, 372 So. 2d 420 (Fla. 1979), that "the only justification for withholding a record or a portion thereof is the custodian's assertion of a statutory exemption." *Id.* at 1076. The Court then observed that to agree with the City or the police officers "would cause us to write into the statute something that is not there, and this we decline to do." *Id.* "Delaying inspection to allow an employee to be present during the inspection is not within the legislative scheme. . . . The employee's presence could serve no legally cognizable purpose, and any delay to allow such presence is therefore inconsistent with the Act, which contemplates only the reasonable custodial delay necessary to retrieve a record and review and excise exempt material." *Id.*

"As to the argument that an automatic delay is necessary to allow an employee time to raise a constitutional challenge," the Court held, "we can only say that the time when the record is requested is not the time to raise such a challenge. . . . The legislature has placed the books on the table; only it has the power to alter that situation." *Id.* at 1078-79.

In *Michel v. Douglas*, 464 So. 2d 545, 546 (Fla. 1985), the Florida Supreme Court explicitly "found no state or federal disclosural privacy right to exist."

In the specific context of autopsy photographs and videotapes, this Court has reviewed these directions from the Florida Supreme Court and has held in *Williams v. City of Minneola*, 575 So. 2d 683, 687 (Fla. 5th DCA 1991), that "neither a custodian of records nor a person who is the subject of a record can claim a constitutional right of

privacy as a bar to requested inspection of a public record in the hands of a government agency."

That the federal disclosural privacy right does not give individuals a right to enjoin the release of public records even though persons who obtain the records might use them to inflict emotional harm should not be surprising because recognition of such a right could result in a torrent of claims against the government and would be extremely difficult to define. Would such a right entitle one to enjoin one agency from releasing to other agencies? Would such a right entitle one to enjoin the government from releasing the information to anyone other than one who could demonstrate good cause for seeking the information? Would tort law principles govern the extent of the right so that one might be able to enjoin the government from releasing information in a manner that would constitute intentional infliction of emotional distress under state tort law, but not other information? And, if that were the case, wouldn't the injunction sought have to be granted or denied on the basis of the likelihood that the individual seeking the records would disseminate the information in such a fashion that the dissemination would result in the intentional infliction of emotional distress? Would allowing inspection of records by a reporter whose news organization had a policy against publishing autopsy photos or even supplying copies to such a reporter who is investigating a crime or an accident not rise to the level of a constitutional violation, while release to other publishers would rise to that level? Could the right to an injunction be determined by the content of the requester's publication and, if so, would not such a determination violate the First Amendment rights of the requester? And, how would the right to disclosural privacy advocated by the plaintiffs in

this case be meaningfully protected? Would they be entitled to each request for a record? Would production of records have to be delayed to allow the assertion of the putative right? If not, would individuals have a right to seek damages against the government for releasing information that third parties used to inflict emotional distress against them?

These are just some of the difficulties that would be created by recognizing a federal disclosural privacy right such as that advocated by the Earnhardts in this case. In light of these practical problems as well as the decisions of the Florida Supreme Court declining to recognize a federal disclosural privacy right, this Court must reverse that aspect of the circuit court judgment granting a permanent injunction against the release of the records. It is plain from the transcript of the proceedings that the trial judge himself concluded that he should not enter the injunction requested by the plaintiffs. Yet, the Earnhardts' lawyers gave him a proposed final judgment that induced him to depart from his own oral ruling. That error should be reversed.

Access to public records in the hands of public officials such as the medical examiner is regulated entirely by statute and no constitutional right exists to overcome that statutory scheme.[33] "Florida's definition of a public record

[33] Access to judicial records, by contrast, are not governed by statute, but by common law principles that allow a balancing of interests. *See, e.g., Barron v. Florida Freedom Newspapers, Inc.*, 531 So. 2d 113 (Fla. 1988) (setting forth factors to be considered before closing civil proceedings); *Miami Herald Publ'g Co. v. Lewis*, 426 So. 2d 1 (Fla. 1982) (setting forth test for closure of criminal proceedings); *State v. Rolling*, No. 91-382 CF A, 1994 WL 722891 (Fla. 8th Cir. July 27, 1994)

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allows access by anyone, and permits exemptions only by legislative amendment. The state courts have refused to establish exemptions in light of the statute, and have not determined that disclosural privacy is a legitimate constitutional right which would override the state interest."[34]

CONCLUSION

The lawsuit filed by Teresa Earnhardt and joined by some of her family members and Dale Earnhardt, Inc. should have been dismissed. An order also should have been entered on Campus Communications' cross claim requiring the defendant medical examiner to make the records that are the subject of this lawsuit available for inspection and copying. In the event that any person or entity that inspects or copies the records uses the records in a manner that is tortious under Florida law, the Earnhardts or any others injured by such uses may pursue

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(allowing inspection but not copying of exhibits introduced in criminal case). The records at issue here were not a part of any judicial proceeding prior to the plaintiffs' commencement of this lawsuit, therefore these decisions have no application here.

[34] Woodson & Tannen, *supra* at 334. Even if this Court were to conclude that a federal disclosural right of privacy does exist and that it requires the Court to balance the interests in public access against the interests in privacy, *see, e.g., Plante v. Gonzalez*, 575 F.2d 1119, 1132 (5th Cir. 1978) (balancing interests), it should hold that the balance weighs in favor of allowing access, *See* Point II *supra*.

claims for any damages that they suffer and for punitive damages to deter such conduct in the future.

Respectfully submitted,

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R. App. 58

IN THE
SUPREME COURT OF FLORIDA

Case No. SC02-1635
Lower Tribunal No. 5D01-2419

CAMPUS COMMUNICATIONS, INC.,
a Florida corporation, Petitioner,

vs.

TERESA EARNHARDT, THE ESTATE OF DALE EARNHARDT, DALE EARNHARDT, JR., TAYLOR EARNHARDT, DALE EARNHARDT, INCORPORATED, COUNTY OF VOLUSIA, OFFICE OF THE MEDICAL EXAMINER, THE STATE OF FLORIDA, and MICHAEL URIBE, Respondents.

On Notice Invoking the Court's Discretionary Jurisdiction to Review Questions Certified to be of Great Public Importance by the Fifth District Court of Appeal

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Petitioner's Initial Brief

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EXPLANATION OF REFERENCES

Citations in this brief are to the record compiled in tale circuit court and filed in the Fifth District Court of Appeal. The notation ("R. ___-___ Ex. or ¶ ___") refers to the volume number – page number, and then, when appropriate, to exhibits or paragraphs of the referenced document. The transcript of the trial below are volumes 17 through 21 of the record. The record is consecutively numbered through the first 16 volumes and then numbering begins again in volume 17.

INTRODUCTION

The Fifth District Court of Appeal's decision below affirmed the trial court's judgment denying the petitioner, Campus Communications, Inc., publisher of *The Independent Florida Alligator,* access to public records on the basis of a sweeping Public Records Law exemption rushed through the Florida Legislature specifically to prevent access to both the requested records – the autopsy photographs of Dale Earnhardt – and to bar access to *all other* autopsy photographs held by medical examiners throughout the State of Florida. The exemption is so broad that it includes not only photographs of recently deceased individuals who have living relatives, but also photographs of individuals who have been deceased for decades and who have no living relatives. Autopsy photographs historically had been open and available for inspection and copying and frequently had been used by journalists, researchers, and others to find and report information important to human safety – including in some instances information showing that an autopsy *report* did, not correctly reflect the cause of death. Few ever used that valuable openness

to cause unjustifiable harm. When they did, tort law compensated the injured and punished the wrongdoers.

The new exemption at issue here, chapter 2001-1, Laws of Florida, codified as section 406.135, Florida Statutes (2001), destroyed that historical balance and violated the constitutional mandate of article I. section 24(c) of the Florida Constitution, that a new public record exemption cannot be created unless a public necessity for the exemption is stated with specificity and the exemption is no broader than necessary to accomplish the stated purpose of the law. This Court first applied this standard in *Halifax Hospital Medical Center v. News-Journal Corp.*, 724 So. 2d 567, 569 (Fla. 1999), invalidating an exemption that, as here, applied both to records that would serve the purpose of the exemption (allowing public hospitals to compete fairly with private hospitals), and those that would not. The inclusion of the latter rendered the entire exemption void and required release of the records at issue even though the release of the records at issue defeated the legislative purpose in its entirety and made competition for public hospitals difficult. That decision required the Legislature to go back to the drawing board and to craft an appropriately narrow exemption.

The Fifth District Court of Appeal did not make any attempt to distinguish the overbreadth of the exemption at issue in *Halifax* from the overbreadth of the exemption at issue here. Instead, it found the exemption here for *all* autopsy photographs to be analogous to the narrow exemption at issue in *Bryan v. State,* 753 So. 2d 1244 (Fla. 2000), for Department of Corrections information "'which if released *would jeopardize* a person's safety.'" *Id.* (quoting Fla. Stat. § 945.10(1)(e) (1999)) (emphasis added). The exemption here could not be more different than the

exemption in *Bryan* because the exemption here is not limited to those photographs which if released *would cause harm,* but rather sweeps within it all photographs including those that plainly would do no harm if released. The Fifth District's decision should be reversed on that basis. Alternatively, the decision should be reversed because the Legislature may not destroy substantive vested rights through retroactive legislation. Once a record has been requested, the right to the record is an immediate, fixed right of present enjoyment. To hold otherwise would destroy the operation of the Public Records Law.

Even, however, if the constitutionality of the exemption is upheld, the Court should vacate the Fifth District's decision because Campus Communications demonstrated good cause under an exception to the exemption created by section 406.135, Florida Statutes (2001), for obtaining access to the records.

Finally, neither the Florida nor the United States Constitution guaranty anyone the right to stop a public official from complying with the Public Records Law, as was contended by some of the respondents.

STATEMENT OF THE CASE AND THE FACTS

Dale Earnhardt died in a crash in the final lap of the Daytona 500 on Sunday, February 18, 2001. (R.9-1670-1696 ¶ 75). In accordance with chapter 406, Florida Statutes, an agent of the medical examiner of the Seventh District in and for Volusia County, Florida, conducted an autopsy on Earnhardt on Monday, February 19, 2001. (R.9-1670-1696 ¶ 92).

Teresa Earnhardt commenced this action on Thursday, February 22, 2001, seeking a temporary and permanent injunction to stop Thomas Beaver, the medical examiner for Volusia County, Florida, from making photographs of the autopsy available to the public and the press. (R.2-290-301). The Court entered an ex parte temporary injunction on the date that the lawsuit was filed. (R.2-302-04).

After the *Orlando Sentinel* appeared in the action on March 2, 2001, to oppose sealing of the records (R.2-315-17, 3-550-56), and other members of the Earnhardt family and Dale Earnhardt, Inc. appeared to support sealing the records (R.2-347-49), the Court referred the matter to mediation. (R.4-750-51).

As the mediation was coming to a conclusion on March 16, 2001, Campus Communications, Inc., publisher of *The Independent Florida Alligator,* a newspaper in Gainesville, Florida, submitted a motion to intervene to seek dissolution of the temporary injunction and dismissal of or summary judgment against the complaint. The motion alleged that Campus Communications had asked that it be allowed to inspect and copy the autopsy photographs and that the medical examiner had not complied with the request. (R.5-771-803). Campus Communications had not participated in the mediation.

On that same day, March 16, 2001, the parties who had participated in the settlement – the *Sentinel,* additional intervening members of the press (R.4-755-58), the medical examiner, and the Earnhardts – announced that *they* had reached an agreement whereby the mediator would appoint an independent expert to review the photographs and audiotapes and would report his findings.

(R.5-766-69). The agreement further provided that after the appointed expert examined the materials at issue they would be permanently sealed. (R.5-766-69).

The circuit court approved the settlement on March 19, 2001. (R.5-770).

Ten days later, on March 29, 2001, the Florida Legislature amended the Public Records Law through Chapter 2001-1, Laws of Florida, to create an exemption to the Public Records Law for autopsy photographs.

On April 3, 2001, Campus Communications filed supplemental materials in support of its motion to intervene showing that autopsy photographs historically have played a critical role in press reports about murders, medical malpractice, prison deaths and numerous other public controversies. (R.7-1163-1311). In some instances, the press had found that medical examiners themselves had made serious errors in determining the cause of death or have themselves engaged in wrongdoing or questionable practices. (R.7-1163-1311 Exs. 5-7, 9-10, 13, 15-17, 19, 22-51). The supplemental materials also demonstrated that the cause of Earnhardt's death had become a public controversy and that the photographs sought were relevant to that controversy. (R.7-1163-11 Exs. 2, 4 & 8).

On April 5, 2001, the circuit court granted Campus Communications' motion to intervene. (R.7-1334). On April 16, 2001, Campus Communications filed a cross-claim against the medical examiner seeking an order under the Public Records Law requiring him to allow inspection and copying of the Earnhardt autopsy photographs. (R.8-1359-75). The claim asserted that Chapter 2001-1 could not be applied retroactively to this case and, in any event, that

the exemption was broader than necessary to serve the purpose for which it had been enacted.

The State of Florida intervened to defend the constitutionality of Chapter 2001-1. (R.8-1376-79).

The medical examiner answered Campus Communications' complaint on May 2, 2001, admitting that the records sought by Campus Communications were public records and that they were not exempt from the disclosure requirements of that law at the time that they had been requested, but asserting that he had been prevented from allowing access to the records by the temporary injunction that had been entered by the circuit court. (R.8-1415-17).

The State answered the complaint on May 9, 2001, asserting that the Chapter 2001-1 was constitutional. (R.8-1452-54). The State took no position regarding the constitutionality of the Public Records Law prior to its amendment even though the Earnhardts contended in their complaint that the law invaded their state and federal constitutional rights.

During the first day of the bench trial on June 11, 2001, the Court heard testimony from Thomas Beaver, the Volusia County medical examiner. He testified that "it's important that we, as a society, know why people die, because . . . it helps us to identify risks to the society as a whole." (R.18-200). He testified that historically his office had treated autopsy reports, including autopsy photographs, as public records and had released the reports and photographs upon the request of any member of the public for inspection and copying. (R.18-202 & R.9-1670-96 ¶ 35).

He testified that he did not follow that practice in this case because of the temporary injunction entered by the circuit court. (R.18-223).

In admissions filed with the court, Dr. Beaver also testified that as medical examiner for the Seventh District, he is responsible for investigating all deaths resulting from homicide, accidents or in sudden unexpected circumstances, that he oversees about 650 autopsies annually, and that his office has a staff of approximately 11 and an annual budget of approximately $1.1 million. (R.9-1670-96 ¶¶ 27, 28 & 32).

Prior to this lawsuit, when a member of the public had asked to inspect or copy the autopsy records relating to a specific deceased person, that member of the public would be allowed to inspect and copy all autopsy records relating to the deceased person, including autopsy photographs, videotapes, and audiotapes. (R.9-1670-96 ¶ 38). More than 50 members of the public had inspected and copied autopsy records maintained by Beaver within the 12-month period preceding February 22, 2001. (R.9-1670-96 ¶¶ 39 & 40). Beaver did not have a policy of requiring notification of relatives of a deceased person before allowing such access (R.9-1670-96 ¶ 41) and rarely was such notification given. (R.9-1670-96 ¶ 42).

Prior to this litigation, individuals who had copied autopsy photographs had not used them for harmful purposes (R.9-1670-96 ¶ 43) and no one had ever asked Beaver to deny members of the public the opportunity to inspect or copy autopsy photographs, videotapes, or audiotapes of a deceased person. (R.9-1670-96 ¶ 44).

Individuals who previously had asked for and obtained access to autopsy photographs included reporters,

privately-employed medical doctors, privately-employed pathologists, privately-employed investigators, educators, medical researchers, sociologists, and acquaintances and relatives of the deceased (R.9-1670-96 ¶ 45) and these individuals sometimes expressed disagreement with the conclusions of the medical examiner regarding the cause of death after they reviewed the photographs. (R.9-1670-96 ¶ 48). Beaver himself had worked as a consultant in civil and criminal litigation and found it essential to review any autopsy photographs for that purpose. "[T]he first thing I ask the attorney for are the pictures," he testified. (R.18-235).

Medical examiners are not the only public officials who take photographs of deceased persons, according to Beaver. Photographs of the deceased are also taken by law enforcement officials in some cases (R.9-1670-96 ¶ 53), although that was not done in the instant case. Those photographs are not kept in the custody of the medical examiner, they are kept by law enforcement agencies. (R.9-1670-96 ¶ 54).

Medical examiners also sometimes take photographs of deceased persons other than autopsy photographs. For example, they take photographs at the scene of an accident or before an autopsy is commenced. (R.9-1670-96 ¶ 55, 56 & 58). Such photographs are not autopsy photographs. (R.9-1670-96 ¶ 59).

Autopsy photographs historically have been used for a wide variety of purposes. Beaver himself has given lectures on autopsies or autopsy investigations (R.9-1670-96 ¶ 64) and he has displayed photographs of autopsies for educational or training purposes to law enforcement

officials, medical students, physicians, forensic pathologists, paramedics, and nurses. (R.9-1670-96 ¶ 65). He also has shown autopsy photographs to other medical examiners or pathologists for the purpose of seeking a second opinion (R.9-1670-96 ¶ 66) and to consultants for the purpose of seeking an expert opinion. (R.9-1670-96 ¶ 67).

In addition to providing the Court with background regarding the historical treatment and use of autopsy photographs, Beaver also explained the events leading up to this litigation. In his admissions, he acknowledged that in the week before Earnhardt died, the *Orlando Sentinel* had published a series of investigative news reports that were highly critical of the National Association for Stock Car Auto Racing, Inc. ("NASCAR"), sponsor of the Daytona 500, for failing to require head and neck restraint systems that could prevent basilar skull injuries in high speed crashes. The articles pointed out that three NASCAR drivers had died in NASCAR races in the previous nine months of head and neck injuries. The articles reported that other racing organizations had required the use of head and neck restraint systems to prevent such injuries.[1]

Immediately after Earnhardt's death on February 18, 2001, Dr. Steve Bohannon, director of emergency medical services for the International Speedway Corporation, reported to the press that Earnhardt had died of a basilar

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[1] Specifically, on February 11, 2001, the *Orlando Sentinel* published an article entitled "NASCAR idles while drivers die." (R.9-1670-96 ¶¶ 68 & 69 and attachments). On February 13, 2001, the *Orlando Sentinel* published an article entitled "Safety slow to arrive despite race carnage." The same day, the *Orlando Sentinel* published an article entitled "NASCAR drivers want own medical staff." (R.9-1670-96 ¶ 70).

skull injury – precisely the same type of injury that had killed the three NASCAR drivers that had been the subject of the *Orlando Sentinel's* critical reports. (R.19-354). Bohannon reiterated his conclusion at a press conference the following day. (R.19-354). To confirm Bohannon's conclusions, reporters requested records from the medical examiner concerning the autopsy of Earnhardt. (R.9-1670-96 ¶ 104). They did not initially, however, request photographs of the autopsy. (R.9-1670-96 ¶ 105).

On Wednesday, February 21, 2001, Bohannon asked the medical examiner's staff to allow him to inspect the photographs of the autopsy of Dale Earnhardt. (R.9-1670-96 ¶ 117) (R.19-353, 361). The medical examiner, consistent with his prior practices, did not advise any relatives of Earnhardt of this request (R.9-1670-96 ¶ 118) and allowed Bohannon's inspection to go forward. (R.9-1670-96 ¶ 119-121). Bohannon testified he was unable to determine from his inspection of the photographs whether Earnhardt's fatal injury had been caused by inertial headwhipping that could have been stopped by a head and neck restraint, seat belt failure, or some other cause. (R.19-365).

After examining the photographs that day, Bohannon reported the results of his inspection to Mike Helton, the president of NASCAR. (R.19-366). Helton told Bohannon that Earnhardt's seatbelt had failed. (R.19-365-66).

On Thursday, February 22, 2001, Teresa Earnhardt filed this lawsuit against the medical examiner (R.9-1670-96 ¶ 127) even though no reporter had requested access to or copies of photographs of the body of Dale Earnhardt during or before the autopsy. (R.9-1670-96 ¶ 128). On the

same day that the suit was filed, without holding a hearing, the circuit court entered a temporary injunction prohibiting release of the photographs. (R.19-302-04).

On Friday, February 23, 2001, NASCAR, sponsor of the Daytona 500, held a press conference in Rockingham, North Carolina, at which they announced that Earnhardt's seat belt had failed and that they did not know why. (R.9-1670-96 ¶ 130) (R.19-369). Bohannon attended the press conference and expressed the opinion that the failure of the seat belt could have been the mechanism that caused the injury that caused Earnhardt's death. (R.19-369).

After the NASCAR press conference of February 23, 2001, reporters for the first time requested access to photographs of the Dale Earnhardt autopsy. (R.9-1670-96 ¶ 132). The autopsy photographs would show the cause of Dale Earnhardt's death. (R.9-1670-96 ¶ 137). The mediation ordered by the circuit court between the Earnhardts, the *Orlando Sentinel* and other media (not including Campus Communications) resulted in an agreement between the mediating parties (R.5-766-69) that the mediator would appoint an independent expert to examine the photographs for no more than 30 minutes and then issue a report concerning the cause of Earnhardt's death. Pursuant to the agreement, the report would be filed with the Court and the photographs then would be "totally and permanently sealed in the most secure manner possible." (R.5-768).

On or about March 26, 2001, Dr. Barry Myers reviewed the autopsy of Dale Earnhardt, including the photographs of the autopsy. (R.9-1670-1696 ¶ 138). He then issued a report on April 9, 2001, expressing his

opinions regarding the cause of Earnhardt's death. (R.7-1345-58).

The Myers' report did not, however, put an end to the controversy concerning either the cause of Earnhardt's death or whether NASCAR had tried to deflect criticism of its safety requirements by falsely claiming that Earnhardt's seat belt failed. Instead, with the photographs still under seal, the report simply fueled further debate in the national press.[2] (R.12-1941-82 Exs. 62-77 & 2395-2404).

At the conclusion of the first day of the trial, the circuit court announced that he had found "that the legislative enactment of Chapter 2001-1 was a valid and constitutional exercise of legislative authority, pursuant to Article 1, Section 24, of the Florida Constitution." (R.18-281). The trial court then invited Campus Communications to attempt to show that it had "good cause" for obtaining access to the photographs pursuant to the standards set forth in Chapter 2001-1. (R.18-281).

In response, Campus Communications offered testimony of Daytona Beach Police Department Sgt. Thomas Youngman, a police photographer (R.19-323-51), Dr. Steve

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[2] For example, on April 30, 2001, the *San Diego Union-Tribune reported:* "NASCAR disputes Earnhardt story." On May 1, 2001, the *Wisconsin State Journal* reported: "Earnhardt's son still believes seat belt broke." Also on the same day, *The Dallas Morning News* reported: "Woman's comments help Earnhardt seatbelt debate intensify." The following day, May 2, 2001, MSNBC headlined a report: "NASCAR knows the truth behind death." A day after that, May 3, 2001, *USA Today* reported: "Earnhardt Jr. confident in NASCAR's probe." Also on that day, *NASCAR Scene Plus* reported: "NASCAR's credibility is being shredded by 'Beltgate.' " (R. 12-1941-82 Exs. 62, 63, 64, 65, 66, 68 & 69).

Bohannon (R.19-352-99), and Teresa Earnhardt (R.20-406-82). Collectively, this testimony showed that the Earnhardt autopsy photographs already had been made available to Bohannon and to Myers, that access to the photographs was relevant and important to resolution of the controversy concerning Earnhardt's death and NASCAR's safety requirements, and that while Mrs. Earnhardt asserted that she would be distressed by anyone having any access to the photographs, that access would not in fact injure her or others.

Campus Communications urged the Court to consider the numerous news reports showing the controversy that existed regarding the cause of Earnhardt's death and NASCAR's assertion that Earnhardt's seat belt failure, rather than its lack of safety requirements, had caused Earnhardt's death. (R.20-478-81). The circuit court again declined to consider the news reports and excluded them from evidence. (R.20-482).

The circuit court then heard, over a relevance objection by Campus Communications (R.20-482-83), testimony from Michelle Bonnett and Beacher Orr, relatives of two NASCAR drivers who also had been killed in crashes at the Daytona International Speedway. (R.20-488-531).

After lengthy closing arguments (R.21-556-732), the trial judge orally announced a ruling that even though Campus Communications had asked for access to the photographs on March 16, 2001, and the Legislature had not created an exemption for the photographs until March 29, 2001, Campus Communications had no right of access to the photographs other than that provided under the amended law and that Campus Communications had not

shown that it was entitled to access under the amended law. (R.21-735-40).

The trial judge found that any bearing that the photographs might have on NASCAR's safety requirements was irrelevant because "that's a private matter that does not involve the Government at all." (R.21-737). He acknowledged that review of the photographs might show that the medical examiner's "office procedures . . . could be different . . . [a]nd the investigation by the Daytona Beach Police Department" might have been conducted differently but "these are incredibly thin excuses to invade the serious privacy rights of the family." (R.21-738).

The trial judge also rejected the Earnhardts' assertion that they had any state or federal constitutional right to require the sealing of the photographs. "Judgment shall be entered in favor of Campus Communication, Inc. . . . on the action pursuant to Article I, Section 23 of the Florida Constitution and the 14th Amendment to the United States Constitution. The temporary injunction shall be dissolved." (R.21-741).

Counsel for the Earnhardts then submitted a proposed final judgment that, contrary to the circuit court's oral ruling, not only dismissed Campus Communications' complaint seeking access to the records, but also entered a permanent injunction sealing the records. Campus Communications objected to the proposed final judgment. (R.15-2432-68). The trial judge nevertheless entered the judgment in the form submitted by the Earnhardts' counsel (R.15-2469-81), contradicting his own oral ruling.

Campus Communications moved for a new trial based on the trial judge's exclusion of news reports showing that

the records sought were relevant to an important public controversy[3] (R.15-2486-91). The trial judge denied that emotion. (R.15-2492).

Thereafter, Campus Communications timely appealed the final judgment. (R.16-2493).

The Fifth District affirmed the trial court's decision, finding that the Legislature is free to make any exemption to the Public Records Law retroactive and that the exemption is not broader than necessary because autopsy photographs is a narrow class of records. *Campus Communications, Inc. v. Earnhardt,* 821 So. 2d 388 (Fla. 5th DCA 2002). The Fifth District also certified that the constitutionality and retroactivity of section 406.135 as questions of great public importance. This Court has jurisdiction to review the Fifth District's decision pursuant to article V, sections 3(b)(3) (decisions expressly declaring a state statute valid and expressly and directly conflicting with a decision of this Court (*Halifax*)) and 3(b)(4) (decisions certified as passing upon a question of great public importance), as well as Florida Rules of Appellate Procedure 9.030(a)(2)(A)(ii) & 9.030(a)(2)(A)(v).

SUMMARY OF ARGUMENT

Point I – Section 406.135 is Unconstitutional. Section 406.135 is unconstitutional for two reasons: (A) it violates article I, section 24(c) of the Florida Constitution because

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[3] The excluded news reports are in the record at R.5-934-61 and R.12-941-82.

it is broader than necessary to serve a specifically stated public necessity; and (B) it violates due process by retroactively destroying the right that Campus Communications had to inspect and copy the records at issue at the time that it made its request.

Point II – Campus Communications Demonstrated Good Cause. Campus Communications demonstrated good cause for access: the photographs could show that Earnhardt did not die as a consequence of the failure of his seat belt, as claimed by NASCAR, but rather from the lack of a head and neck restraint. That would be relevant to a determination of whether NASCAR interfered with law enforcement investigations of the cause of Earnhardt's death to deflect public and press criticism for its failure to require drivers to use head and neck restraints.

Point III – The Plaintiffs Have No Constitutional Right to Block Compliance with the Public Records Law. This Court has repeatedly held that there is no state or federal constitutional right that allows individuals to seek injunctions against public officials to stop them from complying with a requirement of the Public Records Law. For that reason, the trial court's oral ruling rejecting the Earnhardt's request for a permanent injunction was correct and the written final judgment granting the permanent injunction should be reversed.

ARGUMENT

I.

Section 406.135 is Unconstitutional

Section 406.135 is facially unconstitutional in two respects. This is a pure question of law that is reviewable

de novo. See Smith v. Coalition to Reduce Class Size, No. SC02-1624, 2002 WL 31051569 at *4 n.3 (Fla. 2002).

A. The Legislature Violated Article 1, Section 24 of the Florida Constitution by Enacting Section 406.135

The Florida Legislature violated article I, section 24(c) of the Florida Constitution when it adopted chapter 2001-1 in that the Legislature did not state with specificity the public necessity for the law and the law is broader than necessary to accomplish the stated purpose of the law. Article I, section 24 (c) states that to enact an exemption to the disclosure requirements of article I, section 24(a), the Legislature first must "state with specificity the public necessity justifying the exemption" and then must tailor the exemption so that it is "no broader than necessary to accomplish the stated purpose of the law."

This Court first applied this constitutional provision, in *Halifax Hospital Medical Center v. News-Journal Corp.*, 724 So. 2d 567, 569 (Fla. 1999). In that case, the circuit court invalidated an exemption created for "written strategic plans" of public hospitals. Circuit Judge John V. Doyle held:

> The evidence in this case thus showed and the Court finds that not all aspects of written strategic plans are critical and confidential. . . . By creating an exemption for any and all discussion of the strategic plan, the legislature has created a categorical exemption which reaches far more information than necessary to accomplish the purpose of the exemption. All discussion of strategic plans is made secret solely to protect that part of

> the discussion which pertains to critical confidential information. This is facial overbreadth.

Id. at 570 (quoting the final judgment). The defendant had asked the circuit court to narrow the exemption by defining what constitutes "written strategic plans," but the circuit court declined that request, holding that "such a finding is fundamentally legislative rather than judicial." *Id.* at 569.

The Fifth District Court of Appeal affirmed, agreeing that not all aspects of written strategic plans are critical and confidential and that it should not attempt to save the statute by a narrowing judicial construction. *Id.* The Court held the statutory exemption "overbroad on its face."

This Court agreed, holding "the statutory exemption does not meet the exacting constitutional standard of article 1, section 24(c), of specificity as to stated public necessity and limited breadth to accomplish that purpose and is therefore facially unconstitutional." *Id.*

In response to the defendant's request for a judicial narrowing of the exemption to save it, the Court acknowledged a statute should be construed so as not to conflict with the constitution, but held that "a court's discretion to adopt a narrowing construction should be exercised with restraint." *Id.* at 570. The Court held, "we find in this case that we cannot move into the legislature's province by making the factual determination that would bring this statutory exemption within constitutional boundaries. A court may not have the fact-finding machinery to enable it to authoritatively construe a statute and supply a saving construction." *Id.*

The Court observed: "In this case, we do not have before us the relevant information to define 'critical confidential information' or 'strategic plans' for which disclosure would harm the business interests of the hospital. Moreover, in enacting exemptions to Florida's public disclosure laws, the legislature has an express constitutional obligation to tailor such an exemption so that it is no broader than necessary to accomplish the exemption's stated purpose. Thus, the task of enacting a more limited statutory exemption appropriately belongs to the legislature in this case." *Id.*

In applying article 1, section 24(c) and the holding of the *Halifax* case to this case, this Court must first examine the articulated "public necessity" that justifies enactment of the exemption. This articulation is found in section 2 of Chapter 2001-1. It begins not with a statement of the public necessity for the exemption but rather with the conclusion that "it is a public necessity" to exempt the records covered by the exemption. That first sentence is not helpful here because it does nothing to inform the Court about the purpose of the exemption.

Section 2 next states that "photographs or video or audio recordings of an autopsy depict or describe the deceased in graphic and *often* disturbing fashion." (Emphasis added). It further states "Such photographs or video or audio recordings *may* depict or describe the deceased nude, bruised, bloodied, broken, with bullet or other wounds, cut open, dismembered, or decapitated." (Emphasis added). It then concludes that "As such, photographs or video or audio recordings of an autopsy are highly sensitive depictions or descriptions of the deceased which, if heard, viewed, copied or publicized, *could* result in trauma, sorrow, humiliation, or emotional injury to the

immediate family of the deceased, as well as injury to the memory of the deceased." Each of these sentences reflects that the Legislature regarded section 406.135 as necessary because access to the materials at issue could, in *some* circumstances, inflict emotional injury on the immediate family of the subject of those materials.

In choosing the ward "often" rather than "always," the word "may" rather than "do," and the word "could" rather than "will" or "would," the Legislature explicitly acknowledged that the viewing, copying or publicizing of photographs does not always result in trauma, sorrow, humiliation, or emotional injury.[4] The exemption therefore is overbroad on its face in the same way that the exemption in *Halifax* was overbroad on its face. The Legislature

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[4] The Legislature not only has acknowledged through its choice of words that access to autopsy photographs, videotapes, and audiotapes will not always inflict emotional harm on someone, it also has acknowledged that in some circumstances the value of unfettered access to such materials will outweigh any risk that emotional harm will be inflicted by the access. It does this by stating "a surviving spouse may view and copy a photograph or video or listen to or copy an audio recording of the deceased spouse's autopsy. If there is no surviving spouse, then the surviving parents shall have access to such records. If there is no surviving spouse or parent, then an adult child shall have access to such records." The Legislature may have included this provision because spouses, parents and children often will have a need for such records for insurance and estates purposes. That obviously would not always be the case. In some instances, an individual who is within the exemption – for example, an estranged spouse, parent, or child – might well be the one individual who is *most* likely to misuse the materials to inflict emotional harm on others. In other cases, persons other than those listed in the statute – such as non-spousal life partners or non-familial beneficiaries – will have an equally strong, if not greater, interest in access to the records. In its failure to allow these individuals the unfettered access that will be enjoyed by others, the statute is overly broad and in violation of article I, section 24(c).

simply has exempted more records than are necessary to serve the purpose of the exemption.[5]

The Fifth District rejected this argument for two reasons. First, it pointed out that section 406.135 does not apply "to other records of the autopsy such as the written autopsy report" and "the trial court found that there was no information that could be obtained from the autopsy photographs of Mr. Earnhardt that was not contained in the autopsy which was published to the parties and the public." 821 So. 2d at 394. This is flawed on several levels. The availability of the autopsy report does not, as the trial court found and the Fifth District accepted, 821 So. 2d at 393-94, provide an adequate substitute for the photographs themselves. As this Court knows from its familiarity with autopsy photographs used in criminal prosecutions,[6] such photographs frequently contain

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[5] This Court is familiar with the fact that autopsy photographs are not all alike. *See, e.g., Brooks v. State*, 26 FLW S203a (Fla. 2001) (affirming conviction after introduction of five victim autopsy photographs noting that trial courts need only exclude "unduly prejudicial or particularly inflammatory photographs before the jury").

[6] *See Carroll v. State*, 815 So. 2d 601, 621 (Fla. 2002) (affirming conviction based in part on autopsy photographs); *Floyd v. State*, 808 So. 2d 175, 183-84 (Fla. 2001) (rejecting ineffective assistance of counsel claim based on failure to challenge on appeal use of two victim autopsy photographs to convict defendant); *Mansfield v. State*, 758 So. 2d 636, 648 (Fla. 2000) (holding trial court did not abuse discretion in admitting photographs depicting mutilation of victim's genitalia where relevant to medical examiner's determination of manner of victim's death); *Larkins v. State*, 655 So. 2d 95, 98 (Fla. 1995) (affirming admission of autopsy photographs "to show the manner of death, the location of wounds, and the identity of the victim"); *Straight v. State*, 397 So. 2d 903 (Fla. 1981) (affirming conviction where gruesome photographs were admitted over defendant's objection that he would stipulate to the facts); *Young v. State*, 234 So. 2d 341 (Fla. 1970)

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unique, objective information concerning the cause of death that is not and cannot be captured in the words and sketches of an autopsy report or the testimony of a medical examiner. On the other hand, if the autopsy report and other materials that remain unsealed after passage of section 406.135 truly do convey with photographic precision *all* of the information contained in the autopsy photographs, there could be no justification for sealing the photographs in the first instance. In addition, the Fifth District's focus on whether the photographs in this case would provide additional information about Earnhardt's death that was not included in the autopsy report is irrelevant to the question before the Court: whether any autopsy photographs that are included within the exemption contain information not found in unsealed autopsy reports. The answer to that is obvious – medical examiners cannot always record everything that they see. Dr. Beaver himself admitted that individuals have expressed disagreement with the written conclusions of the medical examiner regarding the cause of death after they have reviewed autopsy photographs. (R.9-1670-96 ¶ 48).

The Fifth District also rejected Campus Communications' assertion that the exemption here is overly broad, analogizing it to the exemption at issue in *Bryan v. State*, 753 So. 2d 1244. The court noted that the exemption there had been justified by the Legislature's statement that release of the records "'would *in some cases* conflict with other existing law or would reveal information that would

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(affirming conviction based on autopsy photographs that revealed manner in which several strands of wire had been wrapped around the victim's neck).

jeopardize the safety of the guards, inmates, and others.'" 821 So. 2d at 394 (quoting *Bryan's* quotation of chapter 94-83, Laws of Florida) (emphasis supplied by Fifth District). The Fifth District reasoned that the exemption in *Bryan* "could be considered constitutionally infirm on the same grounds advanced" by Campus Communications because that exemption had been found to serve the articulated public policy only "in some cases." *Id.* at 394. That is not, in fact, what either the Legislature or this Court found. The exemption at issue in *Bryan,* section 945.10(1)(e), applied solely to public records "which if released *would jeopardize* a person's safety." (Emphasis supplied). This exemption exactly tracks the specifically articulated public policy of preventing the disclosure of information that "*would jeopardize* the safety of the guards, inmates, and others." (Emphasis supplied). Under this exemption, only that information that would cause the contemplated harm is exempt.

The Legislature's observation that "in some cases" the exemption conflicts with other existing law is not needed to support the exemption of section 945.10(1)(e). It is needed to justify other subsections of section 945.10(1), that were not at issue in *Bryan,* such as section 945.10(1)(d) which exempts "Parole Commission records which are confidential or exempt from public disclosure by law." Neither this Court nor the Legislature stated, as the Fifth District erroneously concluded, that section 945.10(1)(e) satisfied the requirements of article 1, section 24(c) because disclosure of the information protected by that exemption "'in some cases' would jeopardize an individual's safety." 821 So. 2d at 394. The Legislature was clear that in all cases the exemption would serve the purposes for which it was enacted, prevention of the

release of information that "would jeopardize a person's safety." In *Bryan,* the scope of the exemption matches exactly the scope of the articulated purpose for enacting the exemption and this Court correctly upheld that exemption on that basis.

Section 2 of chapter 2001-1 further observes that "the World Wide Web and the proliferation of personal computers throughout the world encourages and promotes the wide dissemination of photographs and video and audio recordings 24 hours a day and that widespread unauthorized dissemination of autopsy photographs and video and audio recordings *would* subject the immediate family of the deceased to continuous injury." In choosing the word "would" in this sentence, the Legislature perhaps had this specific case in mind. It plainly could not have made that finding with respect to *all* immediate family members of deceased persons because in some instances, immediate family plainly might prefer that the public have the right to inspect, copy, and publish autopsy photographs. For example, when an autopsy photograph would be instrumental in persuading legislators that action should be taken to impose certain safety requirements, family members might be gratified by that use of photographs. Family members also might be gratified by inspection, copying, and publication of autopsy records that leads to the discovery of malpractice or to the uncovering of wrongdoing.[7]

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[7] In *Church of Scientology Flag Service Organization v. Office of the State Attorney of Pinellas County, Florida*, No. 00-4353-C1-13 (Fla. 6th Cir, July 5, 2000) (writ of mandamus and order denying motion for temporary injunction), the circuit court ordered the release of autopsy

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The Fifth District expressly acknowledged this argument, 821 So. 2d at 394 n.3, but chose to address it simply by stating that the argument has "little merit." That does not answer the fact that section 406.135 in fact seals records that no one, including immediate family members, would want sealed.

A further difficulty with the breadth of the new exemption is that inspection alone presents no legally significant risk that the photographs would be published. The Earnhardt family argued below that allowing inspection of photographs would create a risk of publication because of the availability of small cameras used for espionage. This argument proves too much. If one assumes that the public will violate the law to obtain copies of autopsy photos for dissemination, there is no reason to conclude that merely limiting public inspection will be effective. Employees could be bribed and photographs could be stolen whether inspection were allowed or not. The mere possibility that a precaution can be circumvented by illegal activity does not show that a less restrictive precaution (denial of copying) would not be as effective as the most restrictive precaution (denial of all access) to prevent the harm. If the harm to be avoided is publication of autopsy photographs, then the Legislature plainly had available a less restrictive means of achieving that objective than the means that it chose. The Fifth

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photographs to the *St. Petersburg Times*. In that case, Ms. McPherson died while in the custody of the Church of Scientology. The *St. Petersburg Times* sought access to the photographs to demonstrate that the church had mistreated Ms. McPherson. The church, but not the McPherson family, opposed the release of the records.

District also addressed this argument solely in footnote with the two-word observation that it has "little merit." 821 So. 2d at 394 n3.

The overbreadth of the statute is not saved by the inclusion of a mechanism by which a court *may* order the disclosure of some autopsy photographs. That mechanism does not require disclosure where harm would *not* be caused by inspection, copying, or publication of the photographs. Indeed, it does not even require disclosure where "good cause," whatever that may be, is shown. Section 406.135(2)(a), states only that the "court, upon a showing of good cause, *may* issue an order authorizing any person to view or copy a photograph or video recording of an autopsy." The court retains discretion under this statute not to release the materials even when good cause has been shown. Moreover, the legislature has done nothing to define "good cause," other than to indicate that "the court shall consider whether such disclosure is necessary for the public evaluation of governmental performance; the seriousness of the intrusion into the family's right to privacy and whether such disclosure is the least intrusive means available; and the availability of similar information in other public records, regardless of form." These criteria do nothing to ensure that a court's discretion will be confined so that it will allow inspection of materials that will not cause the harm that supposedly justifies the exemption. In fact, the statute does not require the court to release materials under any knowable circumstances. Instead, this part of the statute simply transfers legislative powers to the judiciary and recommends factors for the judiciary to consider in making ad hoc determinations of whether ad hoc access will be allowed to particular records. This creates yet another constitutional defect in

Section 406.135. The Legislature may not delegate the power to enact a law or the right to exercise unrestricted discretion in applying the law.[8] The Fifth District contends that "acceptance of the delegation argument would make every other statute authorizing the courts to act upon a showing of good cause constitutionally suspect," citing ten statutes. 821 So. 2d at 394 n.4. In fact, only two of the ten cited statutes refer to "good cause" at all and do not employ the "may" mechanism.

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[8] *See Sims v. State*, 754 So. 2d 657 (Fla. 2000); *B.H. v. State*, 645 So. 2d 987, 991-92 (Fla. 1994); *Askew v. Cross Key Waterways*, 372 So. 2d 913, 924 (Fla. 1979); *State v. Atl. Coast Line R.R.*, 56 Fla. 617, 47 So. 969 (1908). The Legislature may "enact a law, complete in itself, designed to accomplish a general public purpose, and may expressly authorize designated officials" to administer the law, but only "within definite valid limitations" to allow "operation and enforcement of the law within its expressed general purpose." *Atlantic Coast Line Railroad Co.*, 56 Fla. at 636-37, 47 So. at 976. Chapter 2001-1 does not provide sufficiently definite, valid limitations to allow for the complete operation and enforcement of the exemption. Instead, the legislature has left the courts to determine what constitutes "good cause" for the disclosure of the autopsy records at issue and, to the extent that the legislature has provided guidance with respect to that determination, it has done so on the basis of criteria that are impermissibly based on the past or future expression of the requester. The Florida Supreme Court held a similarly imprecise statute regulating speech to be an invalid delegation of legislative authority in *Brown v. State*, 358 So. 2d 16, 20 (Fla. 1978). The statute in that case made it a misdemeanor to use "profane, vulgar and indecent" language in any public place or private premises within the hearing of others. By leaving to the courts the task of giving meaning to these imprecise terms, the legislature had improperly delegated its legislative authority. "The Florida Constitution requires a certain precision defined by the legislature, not legislation articulated by the judiciary." *Id.* at 20.

The Fifth District bypassed the argument that use of the "good cause" standard leaves section 406.135 overbroad noting that the Legislature has used the "good cause" standard in section 119.07(7)(a), Fla. Stats. (2001), to restrict the scope of one other Public Records Law exemption, *id.* at 394-95, and that "good cause" has been used regularly in other contexts, such as for showing why a lawsuit should not be dismissed for lack of prosecution. *Id.* at 395 n.5. But neither of these observations solves the problems found in section 406.135(2)(a). Section 119.07(7)(a) abrogates exemptions that had been in existence since 1973, see ch. 73-176, Laws of Florida, so the exemption itself was not subject to review under article 1, section 24(c) of the Florida Constitution. Even, therefore, if the good cause provision of section 119.07(7)(a) were completely ineffective to limit the scope of the exemption, the exemption itself still would be valid because of its enactment prior to the adoption of article I, section 24(c) in 1992. In addition, section 119.07(7)(a) does require a court to release records upon a showing of good cause. So, an applicant under section 119.07(7)(a), unlike an applicant under section 406.135(2)(a), at least has the hope that if he or she shows good cause, the court will have no discretion other than to release the records. Finally, the judicial development of "good cause" standards in other contexts does nothing to inform the court about whether there is "good cause" to release an autopsy photograph. While it may be well established that a failure to prosecute a lawsuit should be excused by "proof of a calamity or proof of an opposing party's actions which prevented the plaintiff from prosecuting the cause," *Levine v. Kanlan*, 687 So. 2d 863, 865 (Fla. 5th DCA 1997) (cited by the Fifth District, 821 So. 2d at 395 n.5, as showing that "courts already know the meaning of good cause"), the definition

offers no guidance at all about how to decide good cause for overriding the exemption created by section 406.135.

This type of exemption by delegation to the courts offends article I, section 24(c) in much the same fashion that the defendants' request for a narrowing construction of the exemption in the *Halifax* case offended article I, section 24(c). "[I]n enacting exemptions to Florida's public disclosure laws, the legislature has an express constitutional obligation to tailor such an exemption so that it is no broader than necessary to accomplish the exemption's stated purpose." *Halifax Hospital Medical Center*, 724 So. 2d at 570. By allowing the judiciary to decide which autopsy records will be exempt, the Legislature has failed to exercise its constitutional duty.

B. Section 406.135 May Not be Applied Retroactively.

In *Memorial Hospital-West Volusia, Inc. v. News-Journal Corp.*, 784 So. 2d 438 (Fla. 2001) ("*Memorial Hospital II*"), this Court reaffirmed its view that the right of access granted by the Public Records Law and article 1, section 24 of the Florida Constitution "is a substantive right."[9] Classification of the right of access as substantive is significant because "retroactive abolition of substantive

[9] *See Mem. Hosp.-W. Volusia. Inc. v. News-Journal Corp.*, 784 So. 2d 438, 441 (Fla. 2001) ("*Memorial Hospital II*"); *see also Allen v. Butterworth*, 756 So. 2d 52, 66 (Fla. 2000) (holding legislature "has the authority to define the substantive right to public records" but not the power to regulate "the procedure for public records production in capital cases"); *Henderson v. State*, 745 So. 2d 319, 326 (Fla. 1999) (construing public records law as substantive).

vested rights is prohibited by due process considerations."[10]

There can be no doubt but that Campus Communications' substantive right of access to the records at issue vested prior to the March 29, 2001, enactment of section 406.135, because the records came into the public domain on February 19, 2001, the date on which the autopsy was conducted. The Public Records Law operates to "place[ ] the books on the table." *Tribune Co. v. Cannella*, 458 So. 2d 1075, 1078 (Fla. 1984).[11] In addition, Campus Communications requested the records on March 16, thirteen days before enactment of section 406.135. At the time that the request was made, the medical examiner had no statutory basis to deny the request and he asserted no basis to deny the request. The only basis for denying the request was the improvidently granted temporary injunction that the trial judge ultimately vacated. Campus Communications was entitled to production of the records at the time that it made its request.

In *Cannella*, this Court held that delay in the production of public records is antithetical to the purpose of the law. "Delaying inspection . . . is not within the legislative

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[10] *Metropolitan Dade County v. Chase Fed. Hous. Corp.*, 737 So. 2d 494, 503 (Fla. 1999).

[11] The law plainly had that impact because Steve Bohannon was allowed to inspect the records on February 21, 2001. The prior release of records to a member of the public undermines the justification for withholding the records from other members of the public. *See, e.g., United States v. Camacho*, 22 Media L. Rep. (BNA) 1845, 1849-50 (S.D. Fla. 1994) (allowing CNN access to victim photographs where other members of the press previously had access to same photographs) (Marcus, J.).

scheme." *Id.* at 1076, Section 119.11, Florida Statutes, plainly recognizes the immediate vesting of the right to inspect and copy records in its creation of not only a right to seek immediate judicial enforcement of the statute, but also a right to an expedited judicial determination of such a claim. Significantly, Campus Communications' right to inspect and copy the records arose not only under chapter 119, but also under article I, section 24(a), of the Florida Constitution which provides: "Every person has the right to inspect or copy any public record made or received in connection with the official business of any public body, officer, or employee of the state, other persons acting on their behalf, except with respect to records exempted pursuant to this section or specifically made confidential by this Constitution." Article I, section 24(a), adopted in 1992, "elevated the public's right to government in the sunshine to constitutional proportions."[12]

Article I, section 24(c) of the Florida Constitution specifies that the right of access "shall be self-executing."[13] Thus, even independent of the clear and specific mechanism of chapter 119, Campus Communications' right of access to the records at issue would have vested by virtue of the mandate of article 1, section 24(a).

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[12] *Zorc v. City of Vero Beach*, 722 So. 2d 891, 896 (Fla. 4th DCA 1998) (citing *Monroe County v. Pigeon Key Historical Park, Inc.*, 647 So. 2d 857 (Fla. 3d DCA 1967)).

[13] A self-executing right "lays down a sufficient rule by means of which the right or purpose which it gives or is intended to accomplish may be determined, enjoyed, or protected without aid of legislative enactment." *Gray v. Bryant*, 125 So. 2d 846, 851 (Fla. 1960).

That the Legislature may have been contemplating legislation to create an exemption to the disclosure requirements of the Public Records Law and to article I, section 24(a) at the time that Campus Communications submitted its request could not have prevented Campus Communications' rights from vesting at the time of its request or earlier. To hold otherwise would authorize every public official to withhold public records merely because of the mere possibility that legislation would be passed to exempt the requested record from the law.[14] This could eviscerate the law by authorizing the indefinite withholding of records whenever there was a possibility of new legislation. Would the filing of a bill alone be regarded as a sufficient basis for a public records custodian to withhold a record? Would committee action be sufficient? Should courts stop enforcing the law if its repeal is simply advocated? Could a public official be deemed to have violated the law if he or she withheld a record because the law might be amended, but it was not? How long should courts await legislative action? These questions demonstrate that the rule of law must be that a public records custodian may not withhold records once they have been requested even though a prospect exists for the law to change.

Traditional principles governing the determination of whether a statute can, consistent with due process, be applied retroactively, also lead to the conclusion that

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[14] Because Campus Communications submitted its request for access to records *before* the Legislature acted, the Court need not decide in this case whether a member of the press or public that requested the records *after* the Legislature acted would have a vested substantive right.

Campus Communications' right to inspect and copy the photographs, videotapes, and audiotapes vested. "Despite formulations hinging on categories such as 'vested rights' or 'remedies,' it has been suggested that the weighing process by which courts in fact decide whether to sustain the retroactive application of a statute involves three considerations: (1) the strength of the public interest served by the statute, (2) the extent to which the right affected is abrogated, and (3) the nature of the right affected."[15] Merely labeling a statute as "remedial"[16] does not make it so[17] and the Fifth District acknowledged as much, 821 So. 2d at 398, but then avoided retroactivity balancing analysis by asserting that one's right of access to public records is simply not a vested right protected by due process because it is "public" right, rather than a "private" right. *See* 821 So. 2d at 398-401. The cases from other jurisdictions cited for the Fifth District for this dichotomy

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[15] *State Department of Transportation v. Knowles,* 402 So. 2d 1155, 1158 (Fla. 1981).

[16] The Fifth District asserted that a statute should be treated as remedial if it is seeking to remedy a problem. 821 So. 2d at 396. All statutes typically seek to remedy problems. That does not, however, render them impervious to attack when they destroy vested rights. A "remedial" statute is one that leaves a substantive right intact, but alters the remedy for violation or exercise of that right. *See, e.g., Village of El Portal v. City of Miami Shares,* 362 So. 2d 275 (Fla. 1978); *Grammer v. Roman,* 174 So. 2d 443 (Fla. 2d DCA 1965). The exemptions in both *Roberts v. Butterworth,* 668 So. 2d 580 (Fla. 1996), and *City of Orlando v. Desiardins,* 493 So. 2d 1027 (Fla. 1986), kept the right of access to records intact, but altered the remedy for exercising that right by delaying the time for inspection and copying.

[17] *See State Farm Mut. Auto. Ins. Co. v. Laforet,* 658 So. 2d 55 (Fla. 1995); *Arrow Air, Inc. v. Walsh,* 645 So. 2d 422 (Fla. 1994); *State v. Lavazzoli,* 434 So. 2d 321 (Fla. 1983).

are inapposite because they do not involve public records at all.[18] The Florida cases cited by the Fifth District also are inapposite because they do not involve public records.

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[18] *See Hodges v. Snyder,* 261 U.S. 600 (1923) (legislature can amend law after court enters judgment requiring closure of school based on prior law); *Pennsylvania v. Wheeling & Belmont Bridge Co.,* 59 U.S. 421 (1855) (Congress can enact law requiring bridge to remain notwithstanding an injunction requiring its removal based on prior law); *Mendly v. County of Los Angeles,* 28 Cal. Rptr. 2d 822 (Cal. Ct. App. 1994) (due to fiscal emergency, California limit welfare payments even after court entered judgment requiring counties to provide general assistance grants above current statutory levels); *Van de Kemp v. Gumbiner,* 270 Cal. Rptr. 907, 924 (Cal. Ct. App. 1990) ("when a government agency enters into a settlement agreement in the public interest with an entity subject to its authority and the agreement comes into clear conflict with subsequently enacted legislation, the legislation controls"); *Robinson v. City of Winfield,* 219 P. 273 (Kan. 1923) (individual has no vested right in property which prevents it from being taken for a public use under the power of eminent domain); *Holen v. Minneapolis-St. Paul Metro. Airports Comm'n,* 84 N.W.2d 282 (Minn. 1957) (legislature entitled to remove public hearing requirement after property owners near airport brought suit against the airport commission seeking to compel public hearing); *Yow v. Tishomingo County Sch. Bd.,* 172 So. 303 (Miss. 1937) (new law validated school district after taxpayer suit commenced to enjoin collection of taxes levied by illegally organized school district); *Becker v. Adams,* 181 A.2d 349 (N.J. 1962) (repeal of 1895 act allowing petition to form independent community was valid after filing of petition); *Bradford v. Suffolk County,* 15 N.Y.S.2d 353 (N.Y. App. Div. 1939) (state could legislatively authorize county "charge back" to town after judgment entered prohibiting charge back), *judgment affirmed as modified,* 28 N.E.2d 932 (N.Y. 1940); *Jackson County v. Jackson Educ. Serv. Dist.,* 752 P.2d 1224 (Or. Ct. App. 1988) (taxing district, as governmental subdivision, had no due process right not to have judgment affected by subsequent legislation); *Inman v. R.R. Comm'n,* 478 S.W.2d 124 (Tex. App. 1972) (law validating Railroad Commission injunction against trucking operations did not violate due process by rendering action against commission moot); *Leuch v. Egelhoff,* 51 N.W.2d 7 (Wis. 1952) (legislature could ratify city's illegal payments to tree trimming company after appellate court ruled for taxpayer).

They do, however, tend to support the principle that once a public record has been requested, the right to inspect and copy it has vested. For example, *City of Sanford v. McClelland,* 163 So. 513 (1935), held that "[a] vested right had been defined as an 'immediate, fixed right of present or future enjoyment.'" *Id.* at 514. *Division of Workers' Comp. v. Brevada,* 420 So. 2d 887, 891 (Fla. 1st DCA 1982), held in order for a right to have vested, "'it must have become a title, legal or equitable, to the present or future enforcement of a demand.'" Section 119.07(1) of the Public Records Law provides that after a record is requested the "person who has custody of [the] public record shall permit the record to be inspected . . . and shall furnish a copy"). Section 119.11(1)(a), Florida Statutes, recognizes the immediate enforceability of the right, providing, "Whenever an action is filed to enforce the provisions of this chapter, the court shall set an immediate hearing." This Court, of course, has held that "Delaying inspection . . . is not within the legislative scheme." *Cannella,* 458 So. 2d at 1076.

Had the Fifth District performed the balancing required to determine whether a statute can be retroactively applied, it would have found retroactive application of the statute unconstitutional.

The public interest which the respondents claimed the statute would serve was the prevention of emotional distress to the Earnhardt family and to the families of others whose relatives are autopsied. In assessing strength of this interest, the Court should consider that autopsy photographs have been open to public inspection for decades since the Public Records Law was enacted in 1909 and that there are few instances of such access ever causing any harm to family members whatsoever. It also

should consider that when access allowed by the law has been abused, tort remedies have been readily available to compensate and punish.[19] Tort law has served as a powerful deterrent to prevent the misuse of records released by public officials and would in this case. If *The Independent Florida Alligator* were to use its right of access to the photographs to publish them and if that publication unjustifiably inflicted emotional distress on the Earnhardt family, it unquestionably would be subject to substantial claims for compensatory and punitive damages.

In assessing the second factor in this Court's retroactivity test, the Court should consider that abrogation of the right is complete. Although the legislation creates the possibility that records may be released through a court order in some circumstances,[20] it

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[19] *See, e.g., Williams v. City of Minneola,* 575 So. 2d 683 (Fla. 5th DCA 1991) (police officers violated the rights of the mother and sister of a 14-year-old boy who had died of a drug overdose by gratuitously showing videotape of boy's autopsy and gratuitously displaying autopsy photos in a party atmosphere where the audience was joking and laughing); *Armstrong v. H&C Communications, Inc.,* 575 So. 2d 280 (Fla. 5th DCA 1991) (holding that television stations could be held liable for intentional infliction of emotional distress arising from the broadcasting of videotape of skull of a child shown by medical examiner).

[20] The criteria specified by the Legislature for allowing access are themselves constitutionally deficient because they invite, if not require, judges to deny access based on the viewpoint of the requester. Even if the state has no constitutional obligation to grant access, *see L.A. Police Dep't v. United Reporting Pub'g Corp.,* 120 S. Ct. 483 (1999), once it decides to grant access, it may not consistent with the First Amendment and Equal Protection Clause deny access to some on the basis of viewpoint. *Cf. Legal Servs. Corp. v. Velazquez,* 121 S. Ct. 1043, 1050 (2001) (government cannot condition subsidies on basis of viewpoint); *Good News Club v. Milford Cent. School,* 121 S. Ct. 2093 (2001)

(Continued on following page)

cannot be denied that in many instances the new law denies access to records that previously had been allowed. Indeed, in this case the Earnhardts successfully argued that Section 406.135 had destroyed Campus Communications' right of access.[21] The availability of the autopsy

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(exclusion of Christian children's club from meeting after hours was unconstitutional viewpoint discrimination); *National Endowment for the Arts v. Finley,* 118 S. Ct. 2168 (1998) (NEA may not "leverage its power to award subsidies on the basis of subjective criteria into a penalty on disfavored viewpoints"); *Rosenberger v. Rector & Visitors of Univ. of Va.,* 515 U.S. 819 (1995) (state university may not disburse student activity fees on viewpoint-based terms); *Anderson v. Cryovac,* 805 F.2d 1, 9 (1st Cir. 1986) ("danger in granting favorable [access] to certain members of the media is obvious; it allows the government to influence the type of substantive media coverage that public events will receive"). The court in the instant case expressly grounded its decision denying access, in part, on the viewpoint of the requesters that autopsy photographs under some circumstances should be published. (R.15-2469-81 at ¶¶ 15-16) (referencing past and future publications of the requesters as justification for denying access). Both the order and section 406.135 abridge the First Amendment and deny equal protection by denying on the basis of viewpoint access to records made available to others.

[21] In Point II *infra,* petitioner maintains its assertion that good cause has been demonstrated and that the order below should be released on that basis. As noted, however, section 406.135(2)(a) vests discretion in the trial court to withhold records even in the face of a showing of good cause. Unless, therefore, this Court finds a way to construe section 406.135(2)(a) as requiring release upon a showing of good cause and further construes "good cause" as encompassing the showing made here, the trial court's ruling on this point cannot be reversed. Before enactment of chapter 2001-1, records could be accessed irrespective of the reason for which they were sought. *See Booksmart Enters., Inc. v. Barnes & Noble Coll. Bookstores, Inc.,* 718 So. 2d 227, 228, n.2 (Fla. 3d DCA 1998) ("reason for wanting to view and copy the documents is irrelevant"); *Staton v. McMillan,* 597 So. 2d 940, 941 (Fla. 1st DCA 1992), *review dismissed sub. nom., Staton v. Austin,* 605 So. 2d 1266 (Fla. 1992) (reasons for seeking access "are immaterial"); *Lorei v. Smith,* 464 So. 2d 1330, 1332 (Fla. 2d DCA 1985) ("legislative objective

(Continued on following page)

report does not as the trial court found and the Fifth District accepted provide an adequate substitute for the photographs themselves. It is only the photographs that will either corroborate or refute the accuracy of the autopsy report.

As shown by numerous news articles filed with the trial court, autopsy photographs have been used by investigators for years to demonstrate that medical examiners make mistakes or, in some instances, intentionally seek to cover up wrongdoing by filing erroneous autopsy reports. And a strong case can be made, *see* Point II *infra,* that the photographs sought here would tell the press and the public much about whether NASCAR engaged in an intentional obstruction of a law enforcement investigation by falsely asserting Earnhardt's seat belt broke,[22] whether law enforcement officials failed

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. . . was to insure . . . the right freely to gain access to governmental records. The purpose for such inquiry is immaterial."), *review denied,* 475 So. 2d 695 (Fla. 1985); *News-Press Publishing Co. v. Gadd,* 388 So. 2d 276, 278 (Fla. 2d DCA 1980) ("the newspaper's motives [for seeking the documents], as well as the hospital's financial harm and public harm defenses, are irrelevant in an action to compel compliance with the Public Records Act").

[22] The manufacturer of the seat belt, Bill Simpson, reportedly filed a libel action against NASCAR that contends that NASCAR's assertion that he caused Earnhardt's death are false. *See* "Seat Belt Maker Files Suit Against NASCAR – Simpson Says He Was Unfairly Blamed in Earnhardt's Death," http://www.click2houston.com/sh/sports/nascar/stories/nascar-12334520020213-110205.html (Feb. 13, 2002); "Simpson Seeks Public Apology," http://espn.go.com/rpm/wc/2002/0211/1327350.html (Feb. 12, 2002) (quoting Simpson as saying, " 'Everyone who has ever dealt with NASCAR has acquiesced to them and nobody will stand up to them. But they picked the wrong guy this time. I'm not going away quietly and they deserve to pay for what they did to me and my company's reputation' ").

to detect this possible obstruction, and whether the medical examiner properly determined the cause of death. But whether the particular photographs at issue in this case contain such information is irrelevant to the constitutionality of the exemption. The fact is that autopsy photographs often do contain such valuable information and the exemption here at issue has destroyed the accessibility of it in many instances.

Finally, the nature of the right affected is a fundamental constitutional right. The right of access to public records always has been regarded as a paramount value in Florida.[23] It assures government accountability and protects the public and individuals against both negligence and corruption. Through their adoption of article I, section 24 of the Florida Constitution, the people of the State of Florida eliminated any doubt that the courts should accord their right of access fundamental stature. *Memorial Hospital II,* 784 So. 2d at 481. Today, the right of access to public records is plainly a substantive right of the highest value.

Weighing all three of these factors together leads to the conclusion that this Public Records Law exemption cannot, consistent with due process, be applied retroactively. That is not to say that no Public Records Law exemption ever could be applied retroactively. Where the importance of the exemption is great or the exemption does not deny access entirely or both, an exemption can be retroactive and constitutional. Examples of such exemptions are found in *Roberts v. Butterworth,* 668 So. 2d 580

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[23] *See Generally Shevin v. Byron, Harless. Schaffer, Reid & Assocs.,* 379 So. 2d 633, 640 (Fla. 1980).

(Fla. 1996); and *City of Orlando v. Desjardins,* 493 So. 2d 1027 (Fla. 1986). In both cases, this Court upheld exemptions essential to protect the work product of agency attorneys. Unlike the exemption created by the section 406.135, these exemptions served important interests with respect to all of the records to which they applied[24] and simply would *postpone* the time at which a requester could have access to the records until after the conclusion of the litigation. These features of the exemptions allowed their retroactive application. The Legislature could have incorporated similar features into section 406.135 by delaying access for a certain period of time, but chose not to do so.

II.

Campus Communications Should Have Been Granted Access Under Section 406.135

In the event that the Court upholds the constitutionality of section 406.135, it then should consider whether the circuit court erred in holding that Campus Communications had not shown good cause under section 406.135 to inspect and copy the photographs. The Court's ruling is based on findings that are not supported by substantial competent evidence and legal conclusions that are incorrect.

Section 406.135 first suggests that a trial judge should consider whether access to the records is necessary for public evaluation of governmental performance. The

[24] All work product, by definition, would reflect a "mental impression, conclusion, litigation strategy, or legal theory" of an agency attorney. *See* Fla. Stat. §119.07(3)(1).

circuit court erred as a matter of law in interpreting this criterion as narrowly as it did. Access to autopsy reports, including photographs, has been regarded as necessary for such evaluation for many years. The Legislature first enacted the Public Records Law in 1909. 1909 Laws of Florida, chapter 5942, sec. 1. The statute stated: "All state, county, and municipal records shall at all times be open for a personal inspection of any citizen of Florida." No exemption was made for autopsy reports. The law has been amended innumerable times since 1909, but until this year, there was no general exemption for autopsy reports and for good reason. Access to autopsy reports helped to ensure that the medical examiner did his job correctly and inspired public confidence in conclusions reached by the medical examiner. Both are important objectives because the medical examiner is in many ways the public's first line of defense against criminal activity, product liability, and disease. That official is required to determine the cause of a death that occurs by crime or accident or under any unusual circumstances.[25] The ability to review the medical examiner's work is therefore vital to the public and the press.[26] Closing objective records such as

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[25] Autopsies are authorized by the Medical Examiner by section 406.11, Florida Statutes, when any person dies in the state of criminal violence, by accident, by suicide, suddenly, when in apparent good health, unattended by a practicing physician, in prison or a penal institution, in police custody, in any suspicious or unusual circumstance, by criminal abortion, by poison, by disease constituting a threat to public health, by disease, injury, or toxic agent resulting from employment; when a dead body is brought into the state without proper medical certification; or when a body is to be cremated, dissected, or buried at sea.

[26] Reporters regularly have exercised that right to investigate and to report about criminal activities, accidental deaths and other

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photographs to the public, substantially interferes with the public's ability to evaluate the medical examiner's work. It is left solely with the subjective autopsy report and no ability to evaluate its accuracy.

The circuit court acknowledged that access to the records also might help to evaluate NASCAR's safety requirements, but deemed this to be a "private" matter, not involving governmental performance. NASCAR conducts races, however, only with the approval of the government. The Legislature certainly has the power to stop races that regularly result in the deaths of drivers or to condition their continuance on the organizer taking certain safety precautions. The photographs that were sought in this case could help to confirm that Dale Earnhardt's death could have been prevented had certain safety equipment been required by NASCAR. That might lead to legislation to make racing safer.

The intrusion into the family's right to privacy by inspection and copying of the records cannot be found to invade the family's privacy rights at all because the family would not even be aware of the inspection or copying. The misuse of autopsy photographs *after* they have been inspected and copied can, of course, be tortious. "One who behaves outrageously with regard to pictures of a dead body can be presumed to know that severe emotional

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important matters. *See* Carl Hiaasen, "Banning Autopsy Photos is Dangerous," *The Miami Herald* (Mar. 11, 2001) ("Many times, deaths that initially were ruled accidents or suicides have later been revealed as homicides. These crimes were uncovered because someone took a fresh look at the case. It might have been a family member or a friend, an insurance investigator or even a journalist.").

distress will be inflicted thereby on those who were closely related to the deceased, should those survivors become aware of the tortfeasor's behavior." *Williams v. City of Minneola,* 575 So. 2d 683, 693 (Fla. 5th DCA 1991). Similar conclusions have been reached in other cases.[27] No case, however, has held that the mere inspection and copying of autopsy records is an invasion of a family's privacy rights.

Another factor that the circuit court should have considered in weighing the request for access was that Earnhardt invited intense public scrutiny of every aspect of his life through his decision to engage in a sport that is extremely dangerous, that regularly results in the deaths of drivers, that attracts millions of fans and television viewers, and that makes millions of dollars for race organizers, participants and sponsors. A family that has invited so much public attention and that has benefited financially and otherwise by such extensive public attention cannot have the same expectation of privacy as individuals who have not engaged in such activities.[28]

The circuit court should have concluded that allowing inspection and copying of the photographs is the least intrusive means available to satisfy the request for access

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[27] *See, e.g., Armstrong v. H&C Communications, Inc.,* 575 So. 2d 280 (Fla. 5th DCA 1991) (holding that television stations could be held liable for intentional infliction of emotional distress arising from the broadcasting of videotape of skull of a child shown by medical examiner).

[28] *See generally Bartnicki v. Vopper,* 121 S. Ct. 1753, 1765 (2001) ("One of the costs associated with participation in public affairs is an attendant loss of privacy").

because less intrusive means, such as the limited access allowed to a court-appointed expert, cannot quell the controversy surrounding Earnhardt's death. The availability of a written autopsy record cannot suffice because it plainly does not contain all of the same information available from photographs. Moreover, even if the photographs showed nothing more than the autopsy report, access to the photographs still would be necessary to confirm this. As shown in the record, autopsy reports often are not accurate and inspection of photographs can demonstrate this. At a minimum, the Court should reverse the denial of the motion for new trial that was based on the trial court's exclusion of news articles showing the relevance of the photographs to an important public controversy.

III.

Judgment Should Have Been Entered Against the Earnhardts' Disclosural Privacy Claim

Irrespective of how the Court rules on section 406.135, it should vacate the permanent injunction sealing the records. The Earnhardts requested that that relief in their complaint, but there never was any basis for that. This issue is also reviewable *de novo* because it rests on purely legal matters. *See Smith,* 2002 WL 31051569 at *2.

A. The State Constitutional Privacy Right Does Not Limit the Public Records Law

Article 1, section 23, which amended the Constitution on November 4, 1980, provides: "Every natural person has the right to be let alone and free from governmental intrusion into the person's private life except as otherwise

construed herein. *This section shall not be construed to limit the public's right of access to public records and meetings as provided by law.*" (Emphasis added). The second sentence of the section "was added to prohibit use of the privacy amendment to impede public access to public information.[29] "The legislature designed the amendment to control the collection of information rather than disclosure."[30] Thus, "[a]lthough legislative revision of [the Sunshine and Public Records Law] remains possible, the courts are precluded from invalidating or creating exceptions to these laws on the basis of" article 1, section 23.[31] This Court has repeatedly adhered to this view.[32]

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[29] R. D. Woodson & Ricki L. Tannen, *Federal Constitutional Privacy & The Florida Public Records Law: Resolving the Conflict,* 33 U. Fla. L. Rev. 313, 337 (1980) (footnotes omitted) (citing Public Administration Clearing Service, [sic]

[30] *Id.* at 337 (footnotes omitted).

[31] Joseph S. Jackson, *Interpreting Florida's New Constitutional Right of Privacy,* 33 U. Fla. L. Rev. 565, 580 (1981); *see also* Gerald B. Cope, *A Quick Look at Florida's New Right of Privacy,* 55 Fla. Bar J. 12, 12-13 (1980).

[32] *See Post-Newsweek Stations. Fla., Inc. v. Doe,* 612 So. 2d 549, 552 (Fla. 1992) (article 1, section 23 "has not been interpreted to protect names and addresses contained in public records"); *Michel v. Douglas,* 464 So. 2d 545 (Fla. 1985) (article I, section 23 could not be invoked by employees of public hospital to block access to hospital personnel records that were public records); *Forsberg v. Hous. Auth. of City of Miami,* 455 So. 2d 373 (Fla., 1984) (public housing tenants had no right to enjoin release of information provided by them to public housing authority); *see also Borges v. City of West Palm Beach,* 858 F. Supp. 174, 178 (S.D. Fla. 1994) (recognizing that the Florida Supreme Court has found that article I, section 23 cannot be construed to limit the Public Records Law).

B. There is No Federal Constitutional Privacy Right that Limits the Public Records Law

The federal constitution also provides no basis for the injunction. This Court held in *Shevin v. Byron, Harless, Schaffer & Associates,* 379 So. 2d 633 (Fla. 1980): "The Supreme Court may some day breathe life into the privacy interest asserted by respondents, but, until that occurs, we conclude that there does not exist, under the facts of this case, a constitutionally protected interest sufficient to prevent the public from seeing the consultant's papers." *Id.* at 638.

This Court subsequently rejected assertions of the supposed federal "right" in a variety of circumstances and in each case it has concluded that no such federal right exists to block access to public records.[33] In *Michel v. Douglas,* 464 So. 2d 545, 546 (Fla. 1985), the Court explicitly "found no state or federal disclosural privacy right to exist." In the context of autopsy photographs and videotapes, the Fifth District itself had held in *Williams,* 575 So. 2d at 687, that "neither a custodian of records nor a person who is the subject of a record can claim a constitutional right of privacy as a bar to requested inspection of a public record in the hands of a government agency."

[33] *See Michel,* 464 So. 2d 545 (employees of public hospital had no federal constitutional right to stop access to hospital personnel records that were public records); *Tribune Co. v. Cannella,* 458 So. 2d 1075 (Fla. 1984) (police officers had no constitutional privacy right to delay production of their personnel files); *Forsberg,* 455 So. 2d 373 (public housing tenants had no right to enjoin release of information provided by them to public housing authority).

CONCLUSION

The certified questions should be answered negatively and the decision below should be vacated with instructions for entry of an order requiring the medical examiner to produce the records at issue for inspection and copying.

Respectfully submitted,

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I hereby certify that this brief complies with the font requirements of Florida Rule of Appellate Procedure 9.210(a)(2).

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Supreme Court, U.S.
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In The
Supreme Court of the United States

CAMPUS COMMUNICATIONS, INC.,

Petitioner,

v.

TERESA EARNHARDT, THE ESTATE OF DALE EARNHARDT, DALE EARNHARDT, JR., TAYLOR EARNHARDT, DALE EARNHARDT, INCORPORATED, COUNTY OF VOLUSIA, OFFICE OF THE MEDICAL EXAMINER, THE STATE OF FLORIDA, AND MICHAEL URIBE,

Respondents.

On Petition For A Writ Of Certiorari To The District Court Of Appeal Of Florida, Fifth District

RESPONSE TO PETITION FOR A WRIT OF CERTIORARI OF TERESA EARNHARDT, THE ESTATE OF DALE EARNHARDT, DALE EARNHARDT, JR., TAYLOR EARNHARDT AND DALE EARNHARDT, INCORPORATED

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CORPORATE DISCLOSURE STATEMENT

Dale Earnhardt, Incorporated does not have a parent or publicly held company owning 10% or more of the corporation's stock.

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INTRODUCTION

The petition of Campus Communications, Inc. ("Campus") should be denied because this is a *state* law case involving the tension and balance between two provisions of *state* constitutional law – the Florida constitutional provision protecting personal privacy (Article I, Section 23, Florida Constitution) and the Florida constitutional provision endorsing inspection and copying of public records (Article I, Section 24, Florida Constitution). Campus raised two issues on appeal to the state's intermediate appellate court: whether the Florida statute restricting the public release of autopsy photographs absent a showing of good cause was constitutional under the Florida Constitution; and whether the statute could be applied retroactively under Florida constitutional law to prohibit the release of the autopsy photographs of Dale Earnhardt. (R.App. 24-25).[1] Campus did not properly present any federal constitutional issues to the state courts, and no federal constitutional issues were addressed by any of the three state courts below. (App. 1-48).

Teresa Earnhardt and her family became involved in the case below following the tragic death of her husband, racecar driver Dale Earnhardt, during the Daytona 500 in February 2001. An autopsy was performed on Dale Earnhardt, as required by Florida law, resulting in a very detailed autopsy report and thirty-three autopsy photographs. (App. 3). The autopsy report was released to the public. (App. 3). A written evaluation of the autopsy by an

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[1] The Appendix submitted by Petitioner with its petition is referred to as "App. ___." The Appendix submitted by the Respondents simultaneously herewith will be referred to as "R.App. ___."

independent court-appointed expert was also released to the public. (App. 11). Nonetheless, the press and others made demands under Florida's public records law for release of the autopsy photographs. (App. 4). In March 2001, the Florida Legislature adopted Ch. 2001-1 (the "Florida Act," codified at Fla. Stat. § 406.135, App. 49-54), which requires that the autopsy report remain a public record for public inspection and copying; the Act also, relying upon legislative findings as to the devastating impact on the survivors resulting from public inspection and copying of the autopsy photographs of their decedent, prohibits the inspection and copying of such photographs absent a showing of good cause before a court. Teresa Earnhardt and her family have been involved in resisting efforts to obtain her husband's autopsy photographs and in defending the Florida Act against challenges by the press.

OPINIONS BELOW

Campus Communications, Inc. v. Earnhardt, 821 So. 2d 388 (Fla. 5th DCA 2002) (App. 1), *pet. for rev. den.*, 848 So. 2d 1153 (Fla. 2003) (App. 47); *Earnhardt v. Volusia County, Office of the Medical Examiner*, No. 2001-30373-CICI, 2001 WL 992068 (Fla. Cir. Ct., July 10, 2001) (App. 28).

RESPONSE TO JURISDICTION

The Florida District Court of Appeal entered its judgment on July 12, 2002. This judgment neither addresses nor passes upon any federal constitutional issues. (App. 1-27). Although the District Court of Appeal, an

intermediate court, is the court of last resort as a matter of right for nearly all civil cases, Campus filed a petition seeking discretionary review of the District Court of Appeal's judgment by the Florida Supreme Court on July 22, 2002 in accordance with certain certified questions of Florida law. The Florida Supreme Court declined to exercise its discretionary jurisdiction, denying Campus' petition on July 1, 2003. (App. 47). Petitioner then filed this petition seeking review of the judgment of the District Court of Appeal by this Court pursuant to 28 U.S.C. § 1257(a).

RESPONSE TO PETITIONER'S STATEMENT OF THE CASE

Campus is bound by the extensive findings of fact made by the trial court and affirmed on appeal by the District Court of Appeal. Campus has ignored these findings, and has misconstrued the case and the record below in several significant respects.

First, Campus never properly presented and pursued its alleged federal law claims. Indeed, a review of the record shows that the trial court and the District Court of Appeal focused exclusively on state constitutional claims because they were what Campus argued and presented to those courts. (App. 1-46). In its brief, Campus argued that the Legislature violated Article I, Section 24 of the Florida Constitution by enacting the Florida Act, and that the Florida Act could not be applied retroactively. (R.App. 25-40). The District Court of Appeal, in certifying the question: "Is Section 406.135 constitutional?" referred to the constitutionality of the Florida Act under state – not

federal – law because its decision focused solely on Florida constitutional law. (App. 27).

Second, Campus has misconstrued the Florida Act. (Pet. at 4-5). The Florida Act does *not* prohibit access to autopsy information. (App. at 8). The autopsy report, including its detailed findings, remains public. (App. at 8). The Florida Act limits only the public dissemination of autopsy photographs,[2] and restricts such dissemination to those who demonstrate good cause before a court. Fla. Stat. § 406.135(2)(a).

Similar to judicial pronouncements of this Court and other federal courts, the Florida Legislature provided for disclosure of autopsy photographs on a showing of "good cause" for their production, with that "good cause" to be ascertained after considering: 1) whether disclosure is necessary so the public can evaluate the government's performance; 2) the seriousness of the intrusion into the surviving family's right to privacy; 3) whether disclosure is the least intrusive method available; and 4) the availability of similar information in other public records regardless of form. Fla. Stat. § 406.135(2)(a). The Legislature adopted this limited exemption under its state constitutional authority. Article I, Section 24, Florida Constitution, allows the Legislature to create exemptions to Florida's public records law if two conditions are met: the law states with specificity the public necessity justifying the exemption, and the exemption is no broader than necessary to

[2] A right to immediate disclosure of such photographs remains with a surviving spouse and certain delineated family members, and governmental agencies in furtherance of their official duties. Fla. Stat. § 406.135(1).

accomplish the stated purpose of the law. The District Court of Appeal's judgment affirmed the trial court's order concluding that the exemption created by the Florida Act meets these state constitutional requirements. (App. 27).

Third, Campus' unsupported statement that the autopsy photographs would disclose valuable information that could have saved the life of another racecar driver (Pet. at 21 n.21) is contradicted by the actual record developed below. The record below was not disputed: the autopsy photographs added *nothing* to the written autopsy report already previously published (App. 26), and the uncontradicted testimony established that the photographs at issue were not even of diagnostic quality (App. 24).

Fourth, Campus was not denied access to the autopsy photographs because of its viewpoint. (Pet. at 17). Campus was denied access because it failed to show good cause as required by the Florida Act. (App. 26). Campus' failure to show good cause did not implicate its viewpoint. *Indeed, as Campus concedes at page 10 of its petition, it "chose not to offer any testimony from its reporters or editors."* Instead, it chose to rely upon testimony of a police photographer, the medical examiner, Teresa Earnhardt and numerous newspaper articles by publishers *other* than Campus in order to try to show its own "good cause" for obtaining access to the autopsy photographs. (Pet. at 10). The newspaper articles were rejected by the trial court as inadmissible hearsay. (R.App. 21-22). Since Campus chose not to even offer its own "viewpoint," its First Amendment rights (contrary to its assertions) could *not* be implicated. In fact, since Campus chose to rely upon its counsel's legal argument rather than introducing direct testimony of its

"viewpoint," there was *no* basis for the state court to even consider Campus' "viewpoint."

The District Court of Appeal affirmed the trial court's finding that Campus' unsupported arguments, based on rank speculation about NASCAR safety, were without merit and implicated no governmental interest. (App. 34-35). In fact, according to the trial court, these arguments "were thinly veiled excuses to gain access to the court either for the purpose of arguing the constitutionality of the statute or for making a profit at the expense of [the Earnhardt] family. They are strained arguments and are entirely too tenuous for realistic discussion." (App. 35).[3]

Campus' petition asserts, with no record support, that its "viewpoint" was "that information contained in the photographs (but not necessarily the photographs themselves) should be published in the event that they showed that Earnhardt had died due to NASCAR's failure to

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[3] The court's conclusion is supported by this Court's decision in *U.S. Dep't of State v. Ray*, 502 U.S. 164 (1991). In *Ray*, a Freedom of Information Act requester sought unredacted interview reports of returned Haitian nationals, allegedly to verify whether the government's finding that the returned nationals were not subject to retaliation was correct. In the absence of record evidence "impugn[ing] the integrity of the reports," however, this Court was "unmoved by respondents' asserted interest in ascertaining the veracity of the [government's] interview reports." *Id.* at 179. The Court reasoned that, "[i]f a totally unsupported suggestion that the interest in finding out whether Government agents have been telling the truth justified disclosure of private materials, Government agencies would have no defense against requests for production of private information." *Id. See also, U.S. Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 774 (1989) (allegations that an alleged crime figure "had improper dealings with a corrupt Congressman" were not sufficient to overcome the privacy interest in a rap sheet).

require its drivers to use a head and neck restraint system." (Pet. at 13). Campus never even offered its own testimony, much less this "viewpoint," into the record below.

Finally, Campus neglects to advise this Court as to the interest of intervenor Michael Uribe. Campus describes him merely as a "web master," but omits to advise this Court that Michael Uribe's for-profit web site publicizes, among other things, celebrity autopsy photographs (App. 33), including the autopsy photographs of NASCAR drivers Neil Bonnett and Rodney Orr. (App. 16). The trial court determined that given Dale Earnhardt's popularity, "[i]t is a virtual certainty that these particular autopsy photographs would be posted on one or more of these web sites for immediate, worldwide viewing if they became publicly available." (App. 33).

SUMMARY OF THE ARGUMENT

Campus' petition should be denied because no federal constitutional issues were properly presented to, or addressed by, any of the three state courts below. Campus never pursued the ancillary federal issues set forth in its cross-claim filed in state circuit court, and then abandoned these issues altogether in the intermediate appellate court that entered the judgment Campus asks this Court to review. (R.App. 1-57). Until Campus filed its petition for certiorari in this Court, Campus had focused its appellate challenges exclusively upon Florida constitutional law.

Moreover, Campus has offered *no* compelling reasons for this Court to grant its petition. Not one of the considerations governing this Court's decision to grant certiorari

review, as set forth in Supreme Court Rule 10, is applicable here. Certainly, there is no conflict between the judgment of the District Court of Appeal and any decision of this Court. Two decisions relied upon by Campus – *Los Angeles Police Dep't v. United Reporting Publishing Corp.*, 528 U.S. 32 (1999) ("*LAPD*") and *U.S. v. American Library Ass'n, Inc.*, 123 S.Ct. 2297 (2003) ("*American Library*") – actually *support* the judgment entered by the District Court of Appeal. Accordingly, Campus' petition should be denied.

REASONS FOR DENYING REVIEW

I. Campus' Petition Should Be Denied Because Its Federal Claims Raised Here Were Neither Addressed By, Nor Properly Presented To, The Intermediate State Appellate Court That Rendered The Decision This Court Has Been Asked To Review.

Campus seeks review of the judgment entered by an intermediate appellate state court under 28 U.S.C. § 1257. As applied to the circumstances of this case, that statute requires that petitioner "specially set up or claimed [in the state courts] under the Constitution . . . of . . . the United States," that right which it now seeks to have this Court enforce. 28 U.S.C. § 1257(a). Accordingly, Supreme Court Rule 14.1(g)(i) requires a petitioner seeking review of a state-court judgment to specify, among other things, "when the federal questions sought to be reviewed were raised" in the state court system and "the method or manner of raising them and the way in which they were passed on by those courts . . . so as to show that the federal question was timely and properly raised and that this Court has

jurisdiction to review the judgment on a writ of certiorari." Supreme Court Rule 14.1(g)(i).

This Court rarely, if ever, accepts a case for review where the petitioner's federal claims were not properly presented to the state court below:

> With 'very rare exceptions,' . . . we will not consider a petitioner's federal claim unless it was either addressed by or properly presented to the state court that rendered the decision we have been asked to review.

Campbell v. Louisiana, 523 U.S. 392, 403 (1998), quoting *Adams v. Robertson*, 520 U.S. 83, 86 (1997) (*per curiam*) (in relevant part refusing to address the issue of petitioner's "fair-cross-section claim" because petitioner failed to show the issue was properly presented to the Louisiana appellate courts); *see also Heath v. Alabama*, 474 U.S. 82, 87 (1985); *Illinois v. Gates*, 462 U.S. 213 (1983); *McGoldrick v. Compagnie Generale Transatlantique*, 309 U.S. 430, 434 (1940).

It is thus a long and settled rule that the jurisdiction of this Court to re-examine the final judgment of a state court can arise only if the record as a whole shows either expressly or by clear implication that the federal claim was adequately presented in the state system. *Webb v. Webb*, 451 U.S. 493, 497 (1981), citing *People of State of New York ex rel. Bryant v. Zimmerman*, 278 U.S. 63, 67 (1928); *F.G. Oxley Stave Co. v. Butler County*, 166 U.S. 648 (1897).

Here, Campus seeks review of the District Court of Appeal's judgment on alleged federal constitutional issues, even though the judgment neither passes upon nor even addresses any federal constitutional claim. Moreover, Campus

has not met (because it cannot) its burden of showing that its federal constitutional issues were properly presented to the District Court of Appeal. This is critical because "when the highest state court has failed to pass upon a federal question, it will be assumed that the omission was due to want of proper presentation in the state courts, unless the aggrieved party in this Court can affirmatively show the contrary." *Board of Dirs. of Rotary Int'l v. Rotary Club of Duarte*, 481 U.S. 537 (1987), quoting *Exxon Corp. v. Eagerton*, 462 U.S. 176, 181 n.3 (1983) (in turn quoting *Fuller v. Oregon*, 417 U.S. 40, 50 n.11 (1974) (in turn quoting *Street v. New York*, 394 U.S. 576, 582 (1969). Campus' petition fails to do so.

Campus had several ways to satisfy its jurisdictional requirement. For example, Campus could have shown its federal claims were raised "at the time and in the manner required by the state law," *Bankers Life & Casualty Co. v. Crenshaw*, 486 U.S. 71, 77-78 (1988), or it could have demonstrated that the state procedural requirements could not serve as an independent and adequate state-law ground for the state court's judgment. *See Hathorn v. Lovorn*, 457 U.S. 255, 262-65 (1982). Campus also could have demonstrated that it presented its federal claims "with fair precision and in due time." *People of State of New York ex rel. Bryant*, 278 U.S. at 67; *PruneYard Shopping Center v. Robins*, 447 U.S. 74, 85 n.9 (1980). Campus did none of these.[4]

[4] The only "federal issue" addressed by Campus in the District Court of Appeal was in response to the federal right to privacy argument made by Teresa Earnhardt. (R.App. 46-54).

Campus' brief to the District Court of Appeal makes clear that it had abandoned its alleged federal law issues. (R.App. 1-57). There is no federal issue identified in the table of contents to the brief, and no mention of any federal issue anywhere in the text of the brief (other than its response to the federal right to privacy argument made by Teresa Earnhardt). (R.App. 1-57). No federal issue is identified in the required "statement of issues" on appeal to the District Court of Appeal. *See Beck v. Washington*, 369 U.S. 541, 552-53 (1962) (in relevant part refusing to address federal equal protection argument that had not been properly presented to the state appellate court in accordance with state law); *see also*, *Amalgamated Food Employees Union Local 590 v. Logan Valley Plaza, Inc.*, 391 U.S. 308, 313 n.6 (1968). At the beginning of its brief below, Campus asserts that the Florida Act is unconstitutional for only two reasons: its retroactive application as a possible violation of Florida constitutional law, and its failure to comply with Article I, Section 24, Florida Constitution (R.App. 25-40). The text of its argument focuses *only* on those issues; indeed, only in two lengthy *footnotes* does Campus even suggest other constitutional deficiencies with the Florida Act. (R.App. 31 n.13) (First Amendment and Equal Protection), (R.App. 39 n.18) (unlawful delegation of authority). Campus refers to *LAPD (*the principal decision upon which it bases its petition to this Court) only once, and that is in one of those two footnotes (R.App. at 31 n.13).

Under well-established Florida law, Campus did not present these federal constitutional issues to the District Court of Appeal for its review. *R.J. Reynolds Tobacco Co. v. Engle*, 672 So. 2d 39, 41 n.1 (Fla. 3d DCA 1996) ("It is

elementary that arguments which are not made as a point of appeal, as here, but are found only in a footnote in the appellant's brief, are not properly presented to the appellate court for review.") (citation omitted); *Kaufman v. Bernstein*, 100 So. 2d 801, 803 (Fla. 1958) (accord). Indeed, the federal claims on which Campus now bases its petition were presented to the District Court of Appeal only by amicus curiae, whose brief included ten pages of argument on these ancillary points. However, under Florida law, new issues may *not* be raised by amicus curiae, and thus these ancillary issues were *not* properly presented to the appellate court for review. *See Acton v. Ft. Lauderdale Hosp.*, 418 So. 2d 1099, 1101 (Fla. 1st DCA 1982) (amici may not interject issues not raised by the parties on appeal); *Turner v. Tokai Fin. Servs., Inc.*, 767 So. 2d 494, 496 n.1 (Fla. 2d DCA 2000) (same); *Higbee v. Housing Auth. of Jacksonville*, 197 So. 479, 485 (Fla. 1940) (same).

This Florida rule is fully consistent with that of this Court, which will not consider an argument advanced by amicus curiae when that argument was not raised or passed on below and was not advanced in the court below by the party on whose behalf the argument is now being raised. *See United Parcel Serv., Inc. v. Mitchell*, 451 U.S. 56, 60 n.2 (1981); *Bell v. Wolfish*, 441 U.S. 520, 531 n.13 (1979); *Knetsch v. U.S.*, 364 U.S. 361, 370 (1960). This Court should make no exception here.

Moreover, when reviewing state court decisions, this Court has consistently refused to decide federal constitutional issues raised for the first time in this Court. *Webb*, 451 U.S. at 498-99; *Cardinale v. Louisiana*, 394 U.S. 437 (1969); *Tacon v. Arizona*, 410 U.S. 351, 352 (1973); *Moore v. Illinois*, 408 U.S. 786 (1972).

Campus' federal constitutional claims are simply not properly before this Court, and accordingly, Campus' petition should be denied.

II. The Judgment Of The District Court Of Appeal Is Not In Derogation Of Decisions Of This Court.

Campus contends that the judgment of the District Court of Appeal upholding the constitutionality of the Florida Act under state law is in derogation of this Court's decisions in *LAPD* and *American Library*. Campus' arguments are without merit.

A. The Judgment Is Not In Violation Of This Court's Decision In *LAPD*, But Rather Supports Rational Limitations On Public Access To Sensitive Personal Information.

According to Campus, "a majority of the Justices," or what Campus refers to as "the Court," made "clear that a state cannot constitutionally condition access to its records on the viewpoint of the requestor" in *LAPD*. (Pet. at 14-15). Campus is wrong on multiple levels. First, "the Court" made no such holding in *LAPD*; nor did "a majority of the Justices" make any such holding. This Court held in *LAPD* that a private publishing service lacked standing to bring a facial challenge on behalf of third parties to a statute restricting public dissemination of arrestees' addresses, where the publishing service faced no threat of prosecution or cutoff of funds, and where the statute did not abridge anyone's right to engage in speech, be it commercial or otherwise, but simply regulated access to information in the hands of a police department as to arrestees' addresses. *LAPD* at 39-41. The "statement" attributed by

Campus to "the Court" derives from dicta in a *concurrence*, which dicta is then quoted by one of the *dissenting* opinions. Such dicta is not attributable to "the Court," nor is it relevant to the holding of the case.

The issue in the instant case is access to information. As the Court made clear, there is a fundamental difference between access to government information and the right to speak:

> This is not a case in which the government is prohibiting a speaker from conveying information that the speaker already possesses. *See Rubin v. Coors Brewing Co.*, 514 U.S. 476, 115 S.Ct. 1585, 131 L.Ed.2d 532 (1995). The California statute in question merely requires that if respondent wishes to obtain the addresses of arrestees it must qualify under the statute to do so. Respondent did not attempt to qualify and was therefore denied access to the addresses. For purposes of assessing the propriety of a facial invalidation, what we have before us is nothing more than a governmental denial of access to information in its possession. California could decide not to give out arrestee information at all without violating the First Amendment.

Id. at 40. The Court further noted that although the respondent also challenged the statute as a violation of equal protection under the Fourteenth Amendment, the lower court had not passed on that challenge (as in this case), and thus this Court did not address that issue. *Id.* at 40 n.2.

There is no federal constitutional right of access in the First Amendment, and Campus' argument that there can be no restrictions on access to governmental information is

fatally flawed. *See Houchins v. KQED, Inc.*, 438 U.S. 1, 15 (1978); *Zemel v. Rusk,* 381 U.S. 1 (1965). The concurrence by Justice Ginsburg in *LAPD*, on which Campus purports to rely, makes clear that states may allow *selective* access to government information. *LAPD* at 43. Similarly, the dissent by Justice Stevens upon which Campus relies *specifically acknowledges* that states may limit disclosure based upon a legitimate need for the information: *"Moreover, I think it equally clear that California could release the information on a selective basis to a limited group of users who have a special, and legitimate, need for the information." Id.* at 45 (emphasis added). This is exactly what the Florida statute does: it allows access to autopsy photographs to those who can show good cause to see them before a state court.

Thus, the cobbled "statement" taken out of context and attributable to four Justices in *LAPD* simply does not *support* Campus' argument, but belies it.[5] As the Sixth Circuit has subsequently held (following remand by this Court for further consideration on the basis of *LAPD*) in an as-applied challenge brought by attorneys and chiropractors, a statute restricting access to and dissemination of motor vehicle accident reports does *not* violate free speech or equal protection rights. *See Amelkin v. McClure*, 330 F.3d 822 (6th Cir. 2003). The Florida statute likewise responds to this Court's holding in *The Florida Star v.*

[5] Campus' reliance upon *LAPD*, no matter how misplaced, is very recent. Until filing its petition with this Court, Campus referred to *LAPD* only in one footnote in its brief to the Florida Supreme Court (R.App. 101 n.20), and likewise in only one footnote in its brief to the District Court of Appeal (R.App. 31 n.13).

B.J.F., 491 U.S. 524, 534 (1989), that government has the ability and duty "to forestall or mitigate the injury caused by release of sensitive personal information by classifying that information."

Indeed, if Campus' radical argument were accepted, there could be *no* exemptions from any state open records law and *no* restrictions upon the disclosure of any government information, even under the Federal Freedom of Information Act ("FOIA"). Campus is *wrong*, however. FOIA was not intended to afford the general public a right of access to the vast amount of "information about *private citizens* that happens to be in the warehouse of the Government," *Reporters Comm.*, 489 U.S. at 774 (emphasis in original). Accordingly, this Court has repeatedly upheld the FOIA exemptions, recognizing not only that "public disclosure is not always in the public interest," but that Congress has specifically provided that agency records may be withheld if they fall within one of FOIA's exemptions. *C.I.A. v. Sims*, 471 U.S. 159, 166-67 (1985). Exemption 7(C), which exempts from disclosure any materials that "could reasonably be expected to constitute an invasion of privacy that is unwarranted," has been consistently upheld by this Court against challenges. *Ray*, 502 U.S. at 171; *Reporters Comm.*, 489 U.S. at 756.

In fact, Campus' argument contradicts the important values that the First Amendment seeks to protect. The influential pre-revolutionary essayist Cato wrote in his Letters, "Freedom of speech is the great bulwark of liberty," adding "[w]ithout Freedom of thought, there can be no such thing as wisdom; and no such things as publick liberty, without freedom of speech: Which is the right of every man, *as far as by it he does not hurt and control the right of another*; and this is the only check which it ought

to suffer."[6] The founding fathers understood that protecting freedom of speech and the press is an important means of securing individual liberty in our democratic society.[7] However, to sacrifice individual liberty, as Campus attempts to do, in the name of an unlimited right to access highly personal information about a private individual is to sacrifice the ultimate value for the means of obtaining it.

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[6] John Trenchard & Thomas Gordon, CATO'S LETTERS, No. 15, Feb. 4, 1720, 110, 114 (Ronald Hamowy, ed., Liberty Fund, 1995) (emphasis added).

[7] Advocating the inclusion of the Bill of Rights in our Constitution, James Madison cautioned:

> Wherever the real power of government lies, there is a danger of oppression. In our Government, the real power lies in the majority of the Community, and the invasion of private rights is chiefly to be apprehended not from acts of Government contrary to the sense of its Constituents but from acts in which the Government is the mere instrument of the major number of Constituents.

Letter from James Madison to Thomas Jefferson (Oct. 17, 1788), *reprinted in* 5 THE WRITINGS OF JAMES MADISON 271-72 (Gaillard Hunt, ed., 1904). Thus, Madison believed that the Bill of Rights, including the First Amendment, was essential to protect certain fundamental individual liberties from being sacrificed to the majority will. Yet, when Campus touts the First Amendment in order to use the state as a vehicle to access information concerning a private individual, information to which the press would have no access without exercising state authority, it seeks to have the First Amendment accomplish exactly what Madison warned against. Campus does not seek just to *publish* autopsy photographs, but to manipulate the First Amendment into subordinating the rights of private, individual citizens in the name of an unlimited right to *access* autopsy photographs for which it has demonstrated *no* governmental accountability needs. This manipulation contradicts the spirit of our First Amendment as the bulwark of our freedom.

Campus seeks to use the First Amendment not as a right to publish information, but as a vehicle through which it can co-opt government power to access personal information about private individuals within the state's control. Under Campus' interpretation, the First Amendment ceases to be a bulwark of freedom, and instead turns it into a nuclear warhead used to eradicate the very freedom it was meant to protect.

The Florida Act challenged by Campus below imposes restrictions upon access to government information that are not substantially different from those imposed by the California statute at issue in *LAPD*. Like *LAPD*, the Florida Act limits the disclosure of certain government information based upon the status of the requestor. Florida is even more liberal than California in permitting access; while the California statute limits access only to certain select classes of requestors, the Florida Act permits access to autopsy photographs to anyone who can show a court good cause for such access. Campus' contention that having to show "good cause" to a judge somehow results in illegal viewpoint discrimination is simply frivolous.[8]

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[8] The requirement to show "good cause" before a court is a well established test used frequently in both state and federal law. *See* Fla. Stat. § 119.07(7)(a) (establishing a "good cause" standard governing requests for release of otherwise confidential information in investigations of child abuse, neglect or exploitation). *See also*, Fed.R.Civ.P. 26(c) (allowing trial court to restrict release of information obtained in discovery). In *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 36-37 (1984), this Court found that no heightened First Amendment scrutiny was required for protective orders issued at the discretion of the trial court, prohibiting the release of sensitive information obtained through

(Continued on following page)

Indeed, as this Court has noted, FOIA Exemption 7(C) requires a court to balance the public and private interest, and the court is required to consider the extent to which disclosure of the requested documents would "contribute significantly to public understanding of the operations or activities of government." *Reporters Comm.*, 49 U.S. at 775. Moreover, it is the requestor that bears the burden of "identify[ing] with reasonable specificity the public interest that would be served by release." *Hale v. U.S. Dep't of Justice*, 973 F.2d 894, 900 (10th Cir. 1992), *vacated and remanded on other grounds*, 509 U.S. 918, *reinstating judgment in relevant part*, 2 F.3d 1055, 1057 (10th Cir. 1993). The purpose of FOIA, as the purpose of state public records laws, is to foster governmental openness and accountability, not to disclose information about private citizens. *Reporters Comm.*, 489 U.S. at 774-75. FOIA exemptions that have been upheld by this Court are no different from the Florida public records exemption for autopsy photographs.

Thus, the Florida Act, as applied to Campus, is constitutional if it satisfies the requirements of the equal protection clause – that is, the Florida Act must rationally further a legitimate state interest. *See Romer v. Evans*, 517 U.S. 620, 631 (1996) ("[i]f a law neither burdens a fundamental right nor targets a suspect class, we will uphold the legislative classification so long as it bears a rational relation to some legitimate end.") Florida courts have found that the Florida Act meets these requirements under state law.

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pre-trial discovery "for good cause shown," under the Washington equivalent of Rule 26(c).

B. The District Court Of Appeal's Judgment Does Not Violate This Court's Decision In *American Library*.

The judgment of the District Court of Appeal is also not in derogation of this Court's decision in *American Library*. Once again, Campus has misconstrued this Court's holding, relying on one concurring Justice and three dissenting Justices to support its contention that any restriction upon access to materials in a library "must be subjected to strict or intermediate scrutiny." (Pet. at 19). But *American Library* held that First Amendment forum principles, including those requiring strict scrutiny of an alleged restriction on speech, simply did not apply to an analysis of the First Amendment validity of the Children's Internet Protection Act, under which a public library could not receive federal assistance to provide Internet access unless it installed software both to block images that constitute obscenity or child pornography and to prevent minors from obtaining access to material that was harmful to them, as Internet access in public libraries was neither a traditional nor a designated public forum. *American Library* at 2304.[9]

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[9] In a recent decision, the Fourth Circuit held that an otherwise-permissible status distinction restricting the scope of a limited public forum is valid even if it incidentally affects an activity that constitutes the exercise of a fundamental right by the speaker. *Goulart v. Meadows*, 345 F.3d 239, 261 (4th Cir. 2003). The Court went on to find that while a "'restriction must not discriminate against speech [or speaker] on the basis of view point,' the *restriction is permissible* so long as it is reasonable in light of the purpose served by the forum." *Id.* at 259 (emphasis added) (quoting *Good News Club v. Milford Central Sch.*, 533 U.S. 98, 106-07 (2001)).

Campus' attempt to analogize public library materials with the "library" of government records is unavailing. (Pet. 19-21). This Court has found that while public libraries provide materials for "the interest, information and enlightenment" of their patrons, governmental entities provide access to public records to assure governmental accountability. *American Library* at 2304. Public libraries properly have wide discretion to make content-based judgments in deciding what materials to provide their patrons and thus to the extent Campus argues that public records are analogous to library materials, a governmental entity would have the same broad discretion in *selecting* those materials to be made available to the public. *Id.* at 2305.

Campus failed to bring *American Library* to the attention of the Florida Supreme Court. Certainly, if Campus believed that *American Library* somehow controlled the case below, it had an obligation, once that decision issued, to bring it to the attention of the Florida Supreme Court in a notice of supplemental authority.

III. Campus' Contention That The Florida Act Should Be Stricken Because It Has Become A Model For Other States Is Without Merit And Relies Upon Materials Not A Part Of The Record Below.

Finally, Campus asks that this Court review the District Court of Appeal's judgment because the Florida Act has allegedly "become a model" for states to restrict access to autopsy photographs which were previously subject to public disclosure. Campus' argument not only lacks legal merit, but it also improperly relies extensively upon materials outside the record. The pending matter in

this Court of *Office of the Independent Counsel v. Favish*, No. 02-954, *cert. granted*, 123 S.Ct. 1929 (May 5, 2003) is *not* a part of the record in *this* case, nor is the amicus brief filed therein by Teresa Earnhardt part of the record in *this* case. Campus has nonetheless spent several pages of its petition "responding" to issues raised in the pending *Favish* appeal and criticizing the Earnhardt amicus brief filed in *that* case. (Pet. at 21-29).

Certainly whether or not other states have adopted restrictions upon the public disclosure of autopsy photographs is *not* properly before this Court. Moreover, while the *Favish* appeal *is* pending before this Court, Campus' attempt to argue about that appeal in this petition is patently improper. Moreover, as it did below, Campus supports its arguments with references to websites and newspaper articles, none of which were admissible evidence below, and several of which even post-date the District Court of Appeal's judgment. (Pet. at 9 n.5; 18 n.14; 21 n.21; 22 n.24; 23 n.26; 25 n.31; and 28 n.37). Campus' argument should be disregarded.

CONCLUSION

The Earnhardt family respectfully requests that Campus' petition for certiorari be denied.

Respectfully submitted,

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In The
Supreme Court of the United States
October Term, 2003

CAMPUS COMMUNICATIONS, INC.,

Petitioner,

v.

TERESA EARNHARDT, et al.,

Respondents.

On Petition for Writ of Certiorari to the Fifth District Court of Appeal, State of Florida

BRIEF IN OPPOSITION BY THE STATE OF FLORIDA

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ARGUMENT

I. CAMPUS COMMUNICATIONS' ARGUMENTS WERE NOT PROPERLY PRESENTED TO NOR DECIDED BY THE FIFTH DISTRICT COURT OF APPEAL.

Campus Communications' entire petition is premised upon a contention that Section 406.135, Florida Statutes, violates the right to free speech under the First Amendment, made applicable to the states by the Fourteenth Amendment. The State concurs with and adopts the argument in the brief in opposition by Respondents Teresa Earnhardt, et al. that Campus Communications failed to properly preserve this argument below.

Campus Communications did not present any federal constitutional issues for review in its briefs before the Fifth District Court of Appeal. *See* Fla. R. App. P. 9.210(b)(1) (issues presented for review shall be identified in table of contents). Its only reference to the First and Fourteenth Amendments is in a footnote. (Initial Brief at 25 n.13). Although the State's answer brief asserted that Campus Communications had not properly presented for review any arguments based on the U. S. Constitution (State's Answer Brief at 29-30), Campus Communications failed to respond to this argument in its reply brief. The Fifth District's opinion is silent on the constitutionality of the Section 406.135 under the First and Fourteenth Amendments. *Campus Communications, Inc. v. Earnhardt*, 821 So. 2d 388 (Fla. 5th DCA 2002). Campus Communications did not raise any federal constitutional claims in its briefs filed with the Florida Supreme Court.

Because the entire argument upon which Campus Communications's petition rests was neither properly presented to nor decided by the Fifth District Court of Appeal, this

argument is not a proper ground for granting the petition for certiorari. *See* 28 U.S.C. § 1257(a) (writ of certiorari appropriate when validity of state statute is "drawn in question" on the ground that it is repugnant to the Constitution); *Adams v. Robertson*, 520 U.S. 83, 86 (1997) (Court will not consider federal claim that was not address by or properly presented to state court that rendered decision sought to be reviewed); *Campbell v. Louisiana*, 523 U.S. 392, 403 (1998) (same). As this Court has recognized, it would be "unseemly" to disturb the finality of the decision by the Fifth District Court of Appeal on a federal ground that the state court did not have occasion to consider. *See Adams*, 520 U.S. at 90. The petition should be denied on this basis.

II. SECTION 406.135 IS CONSTITUTIONAL AS APPLIED TO CAMPUS COMMUNICATIONS' REQUEST TO OBTAIN THE AUTOPSY PHOTOGRAPHS.

Campus Communications' petition also fails on the merits. In its "as-applied" challenge, Campus Communications essentially argues that it was denied access to the autopsy photographs of Mr. Earnhardt because it sought the photographs to evaluate the performance of a private entity (NASCAR), rather than to evaluate the performance of government, and that this ground for denying access constituted viewpoint discrimination in violation of the First Amendment. According to Campus Communications, this application of the "good cause" analysis in Section 406.135 impermissibly required Campus Communications to surrender its constitutional right to free speech in order to obtain access to the autopsy photographs, and thus violated the "unconstitutional conditions doctrine." No authority exists for this contention.

Campus Communications' reliance upon *Los Angeles Police Department v. United Reporting*, 528 U.S. 32 (1999) ("*LAPD*"),

is entirely misplaced. The majority opinion in *LAPD*, joined by seven members of the Court, did not even mention viewpoint discrimination or the unconstitutional conditions doctrine. Therefore, this Court should reject on its face Campus Communications' claim that the Fifth District's decision below is "in derogation of" the Court's decision in *LAPD* on these points. Although both concurring opinions in *LAPD* acknowledged the legal principle that a government may not limit access to information based upon viewpoint, one concurring opinion found the principle inapplicable and the other found that the statute in question did not violate it. 528 U.S. at 42, 43. Only the dissenting justices believed that the challenged statute improperly discriminated against disfavored speech. *Id.* at 45-48. Conflict with a dissenting opinion of this Court is not a proper basis for granting a writ of certiorari.

Nor do the decisions of this Court that apply the unconstitutional conditions doctrine suggest that the good cause analysis in Section 406.135 violates the First Amendment. This doctrine holds that the "government may not deny a benefit to a person on a basis that infringes his constitutionally protected freedom of speech." *E.g.*, *Board of County Comm'rs v. Umbehr*, 518 U.S. 668, 674 (1996). Thus, where government makes a benefit widely available, but limits the access of a small group based upon the viewpoint of that group's speech, the government's action violates the First Amendment. *See Good News Club v. Milford*, 533 U.S. 98, 107-12 (2001) (school board's refusal to allow group to use facility to teach children morals and character development from a Christian perspective constituted impermissible viewpoint discrimination); *Rosenberger v. Rector and Visitors of the Univ. of Virginia*, 515 U.S. 819, 828-37 (1995) (university guideline that refused to pay for printing costs for group that promoted belief in a particular deity was unconstitutional viewpoint discrimination). On the other hand, where the challenged regulation does not seek to control any First Amendment activity, the regulation is

permissible. *See Regan v. Taxation With Representation*, 461 U.S. 540, 545-46 (1983) (IRS provision that declined tax-exempt status to organizations that engage in lobbying did not violate First Amendment because it did not prevent organization from lobbying but merely refused to pay for the lobbying with public money).

The denial of Campus Communications' request to view the autopsy photographs of Mr. Earnhardt based upon Section 406.125 does not impose any restrictions or regulations upon Campus Communications' speech. Nothing in Section 406.135 expressly or impliedly restricts Campus Communications' ability to write about NASCAR safety; it simply does not provide Campus Communications access to confidential documents in order to do so. A restriction on access to information is not equivalent to a restriction on speech. *See Houchins v. KQED*, 438 U.S. 1, 9 (1978). Because there is no constitutional right to information in the government's possession, denial of access to such information does not violate the First Amendment.

The Sixth Circuit recently considered a similar challenge to a Kentucky statute which exempted accident reports from public disclosure except to persons related to those involved in the accident and to news-gathering organizations. *See Amelkin v. McClure*, 330 F.3d 822 (6th Cir. 2003), *pet. for cert. filed*, Case No. 03-498 (Sept. 30, 2003). The plaintiffs in that case, attorneys and chiropractors who desired to use the accident reports to market their services, brought an as-applied challenge claiming the exemption restricted their First Amendment right to communicate with prospective clients. *Id.* at 824. The Sixth Circuit concluded the statute did not restrict or even regulate the plaintiffs' expression, but rather simply restricted access to confidential information possessed by the government. *Id.* at 827. The court rejected the plaintiffs' argument that the unconstitutional conditions doctrine applied, because the statute did not condition the disclosure of accident reports to the

plaintiffs on the nature of their speech. *Id.* at 828. So too in this case, Section 406.135 merely restricts access to information in the hands of the government, and in no way restricts Campus Communications from speaking from any particular viewpoint. Therefore, Section 406.135 is constitutional as applied to Campus Communications.

As the final argument in support of its as-applied challenge, Campus Communications asserts that Section 406.135 is subject to strict scrutiny and fails such scrutiny because it is not supported by a compelling interest. (Pet. at 20-21). This contention is necessarily premised upon Campus Communications' initial argument that the statute infringes its constitutional right to free speech. This argument fails because, as demonstrated above, Section 406.135 does not implicate any First Amendment right. *Romer v. Evans*, 517 U.S. 620, 631 (1996) (law that does not burden a fundamental right or target a suspect class is subject to rational basis scrutiny). Campus Communications does not contend that the statute is not rationally related to a legitimate government purpose.

Campus Communications seems to suggest that this Court should accept review in this case as an opportunity to clarify the standard of review that was the subject of disagreement in *United States v. American Library Ass'n*, – U.S. – , 123 S. Ct. 2297 (2003). (Pet. at 19-20). Even if the government regulation in *American Library* was comparable to the regulation challenged in the present case, which it is not, *American Library* provides no support for Campus Communications' assertion that Section 406.135 is subject to strict scrutiny. As Campus Communications acknowledges in its petition, a majority of justices in *American Library* found that the statute in that case was *not* subject to strict scrutiny. 123 S. Ct. 2298, 2310.

In sum, none of Campus Communications' as-applied challenges to the constitutionality of Section 406.135 provide any basis for certiorari. The petition should be denied.

III. SECTION 406.135 IS NOT SUBJECT TO A FACIAL OVERBREADTH CHALLENGE AS IT DOES NOT RESTRICT A FIRST AMENDMENT RIGHT.

Campus Communications also contends that Section 406.135 is facially overbroad. This argument is foreclosed by this Court's decision in *LAPD*.

In *LAPD*, a California statute permitted disclosure of addresses of arrested individuals only when the requester declared under penalty of perjury that the request was made for a scholarly, journalistic, political, government, or professional investigative purpose, and that the requester would not use the information to sell a product or service. 528 U.S. at 35. A private publishing service that sought to sell arrestee address information to attorneys and other buyers challenged this provision on First Amendment grounds. *Id.* at 34. Although the publishing service had not attempted to obtain address information by the means provided in the statute, it asserted that the statute was facially unconstitutional in its application to others. *Id.* at 36, 37-38.

The Court held that the publishing service could not bring a facial overbreadth challenge to the statute based upon how the statute might apply to others not before the court. *Id.* at 38. This was because constitutional rights are personal in nature and as a general rule, courts will only adjudicate constitutional challenges based on the factual situation before them. *Id.* at 39. The Court acknowledged the narrow exception to this general rule for statutes that regulate or proscribe speech, but held that

California's limit upon access to arrestee address information did not fall within this exception. *Id.* at 38, 40. By limiting access to arrestee's address information except for specified purposes, the Court said, the government was not prohibiting a speaker from conveying information already in the speaker's possession or in the public domain. *Id.* at 40; *see also id.* at 43 (Ginsburg, J., concurring). The statute merely imposed requirements for obtaining address information from the government, which information the government was free to withhold altogether. *Id.* at 40. Thus, there was no possibility that protected speech would be muted, and a facial challenge was not warranted. *Id.* at 40, 41.

Based upon its holding in *LAPD*, the Court also vacated a decision by the Sixth Circuit that had allowed attorneys and chiropractors to challenge a Kentucky statute on the grounds that it limited the rights of others not before the court to use information contained in accident reports. *See McClure v. Amelkin*, 528 U.S. 1059 (1999), *vacating* 168 F.3d 893 (6th Cir. 1999). On remand, the Sixth Circuit held that the statute was not subject to such a facial challenge because, like the statute in *LAPD*, it did not restrict expressive speech but simply regulated access to information in the government's possession. *Amelkin v. McClure*, 205 F.3d 293 (6th Cir. 2000). This Court denied certiorari. 531 U.S. 871 (2000).

For purposes of a facial constitutional analysis, the statutes challenged in *LAPD* and *Amelkin* are indistinguishable from the statute at issue in this case. Like the California and Kentucky statutes, Section 406.135 does not regulate or proscribe speech and does not prohibit the communication of information. Section 406.135 poses no possibility that protected speech will be muted, and therefore there is no need to resort to a facial challenge. Accordingly, Campus Communications' attempted facial overbreadth challenge based upon various hypothetical situations not before the court, such as a requester's prior

publications and a requester's unwillingness to reveal a government investigation, fails just as the facial challenges in *LAPD* and *Amelkin* failed.

In light of these precedents, Section 406.135 is not subject to a facial overbreadth challenge because it does not limit protected speech. Campus Communications' petition for certiorari should be denied.

CONCLUSION

For the foregoing reasons, Campus Communications' petition for certiorari should be denied.

Respectfully Submitted,

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In The
Supreme Court of the United States

CAMPUS COMMUNICATIONS, INC.,

Petitioner,

v.

TERESA EARNHARDT, THE ESTATE OF DALE EARNHARDT, DALE EARNHARDT, JR., TAYLOR EARNHARDT, DALE EARNHARDT, INCORPORATED, COUNTY OF VOLUSIA, OFFICE OF THE MEDICAL EXAMINER, THE STATE OF FLORIDA, AND MICHAEL URIBE,

Respondents.

On Petition For A Writ Of Certiorari To The District Court Of Appeal Of Florida, Fifth District

REPLY TO BRIEFS IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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ARGUMENT

Respondents have raised a new issue in their briefs in opposition to the petition: whether the petitioner properly presented and preserved its federal claims below. The issues were preserved because (I) they were raised at the time and in the manner required by state law and (II) the state appellate court rendered an unexpected interpretation of state law.

I.

Petitioner Properly Presented its Federal Claims to the State Appellate Courts and the Courts Improperly Ignored Them

In *PruneYard Shopping Center v. Robins*, 447 U.S. 74 (1980), the Court reviewed a First Amendment argument presented by the appellants over the objection of the appellees that the appellants had "not met their burden of showing that it was raised in the state courts." *Id.* at 85 n.9. The Court held it "is well settled that in challenging the validity of a state law on the ground that it is repugnant to the Constitution of the United States, '[n]o particular form of words or phrases is essential, but only that the claim of invalidity on the ground therefor be brought to the attention of the state court with fair precision and in due time. And if the record as a whole shows either expressly or by clear intendment that this was done, the claim is to be regarded as having been adequately presented.'" *Id.* (citation omitted).

The Court found that although the appellants had appealed to the California Supreme Court on the basis of their assertion that the appellees could not invoke a provision of the California Constitution to override their

constitutionally protected property rights under the Fourteenth Amendment, the appellants adequately raised an alternative First Amendment argument in the California Supreme Court by responding to an amicus curiae brief submitted to the California Supreme Court. *Id.*

In the instant case, the petitioner repeatedly asserted its federal rights in the trial court, *see* Petition at 5-8, argued as its primary ground for reversal that "Chapter 2001-1 is Unconstitutional," and fully explained the basis for the invalidity of the state law under the First Amendment and Equal Protection Clauses of the federal Constitution, citing primary cases from this Court that it relies on here for reversal of the decision upholding the constitutionality of the statute at issue. (R. App. 31).

Notwithstanding the presentation of these federal issues to it, the trial court authored an opinion that expressly addressed solely the parallel state constitutional law issues that had been raised before it. By ignoring the federal issues, the state trial court implicitly and necessarily decided, however, the federal issues presented to it by upholding the constitutionality of the statute at issue and applying that statute. In the court of appeals, the petitioner again expressly raised its federal claims in its brief on the merits. Petition at 12-13. Respondents acknowledge that in the state appellate court petitioner expressly "refers to [*Los Angeles Police Department v. United Reporting Publishing Corp.*, 528 U.S. 32 (1999)] (the principal decision upon which it bases its petition to this Court)," but initially contends that petitioner's federal claims were not properly presented because they were not "identified in the required 'statement of issues' on appeal." Earnhardt Response at 11. They were not identified in the "statement

of issues" because the Florida Rules of Appellate Procedure do not require an appellate brief to contain a "statement of issues," *see* Florida Rule of Appellate Procedure 9.210(b) (setting forth the contents required for an initial brief), and the petitioner's initial brief correctly did not include any statement of issues.

If the respondents are referring to the "table of contents" that is required for the initial brief as a "statement of issues," then the respondents have overlooked the heading of the initial point of the argument section: "Chapter 2001-1 is Unconstitutional." That heading then is followed by an argument section that explains:

> The criteria specified by the Legislature for allowing access are themselves constitutionally deficient because they invite, if not require, judges to deny access based on the viewpoint of the requester. Even if the state has no constitutional obligation to grant access, *see L.A. Police Dep't v. United Reporting Pub'g Corp.*, 120 S. Ct. 483 (1999), once it decides to grant access, it may not consistent with the First Amendment and Equal Protection Clause deny access to some on the basis of viewpoint. *Cf. Legal Servs. Corp. v. Velazquez*, 121 S. Ct. 1043, 1050 (2001) (government cannot condition subsidies on basis of viewpoint); *Good News Club v. Milford Cent. School*, 121 S. Ct. 2093 (2001) (exclusion of Christian children's club from meeting after hours was unconstitutional viewpoint discrimination); *National Endowment for the Arts v. Finley*, 118 S. Ct. 2168 (1998) (NEA may not "leverage its power to award subsidies on the basis of subjective criteria into a penalty on disfavored viewpoints"); *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819 (1995) (state

> university may not disburse student activity fees on viewpoint-based terms); *Anderson v. Cryovac*, 805 F.2d 1, 9 (1st Cir. 1986) ("danger in granting favorable [access] to certain members of the media is obvious: it allows the government to influence the type of substantive media coverage that public events will receive"). The court in the instant case expressly grounded its decision denying access, in part, on the viewpoint of the requesters that autopsy photographs under some circumstances should be published. (R. 2469-81 at ¶¶ 15-16) (referencing past and future publications of the requesters as justification for denying access). Both the order and Chapter 2001-1 abridge the First Amendment and deny equal protection by denying on the basis of viewpoint access to records made available to others.

(R. App. 31). Respondents assert that this did not properly present the argument to the Fifth District Court of Appeal of Florida because the argument was made in a footnote rather than in the text of the brief, citing *R.J. Reynolds Tobacco Co. v. Engle*, 672 So. 2d 39, 41 n.1 (Fla. 3d DCA 1996), and *Kauffman v. Bernstein*, 100 So. 2d 801, 803 (Fla. 1958). The former decision held, ironically in footnote, that "It is elementary that arguments which are *not made as a point of appeal*, as here, but are *found only in a footnote in the appellant's brief*, are not properly presented to the appellate court for review." 672 So. 2d at 41 n.1 (emphasis added). As shown above, Campus Communications' initial point on appeal was that "Chapter 2001-1 is Unconstitutional." The argument is identified as a point on appeal and is not found only in a footnote but in the primary heading over the initial argument for reversal. Florida appellate courts do not require the full text of

every argument to be reflected in the heading of an argument.

As important, the *Engle* decision is not binding in the Fifth District Court of Appeal, *see Pardo v. State*, 596 So. 2d 665, 667 (Fla. 1992) (decisions of sister courts are not binding on each other), and the Fifth District Court of Appeal never has held that issues presented in footnotes are not properly presented for review. Other district courts of appeal regularly have reviewed issues placed before them in footnotes.[1] *Engle* cited a decision of another district court of appeal, *Florida Association of Nurse Anesthetists v. Dep't of Professional Regulation, Board of Dentistry*, 500 So. 2d 324 (Fla. 1st DCA 1986), for the proposition that issues raised in footnotes will not be considered, but in that case the appellate court simply refused to consider an issue that was raised for the first time in a reply brief. It made no suggestion that appellate courts should ignore the footnotes of briefs.

The Florida Supreme Court's decision in *Kauffman* similarly does not support the proposition for which it is cited by the respondents. In that case, the Court declined to consider an argument that was raised in a footnote but not because the argument was raised in a footnote. The

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[1] *See, e.g.*, *Washington v. State*, 765 So. 2d 101 (Fla. 4th DCA 2000) (considering and deciding on motion for rehearing argument "referenced in footnote six of [appellant's] initial brief"); *Jean Fluet, Inc. v. Harrison*, 652 So. 2d 1209, 1211 (Fla. 1st DCA 1995) (considering and deciding argument presented "by a footnote in [appellant's] brief"); *Fla. Auto. Dealers Indus. Beneficial Trust v. Small*, 592 So. 2d 1179, 1181 n.3 (Fla. 1st DCA 1992) (considering and deciding on rehearing issue although "only reference to the . . . issue in appellant's initial brief appeared in a footnote").

Court declined to consider that argument because it did not point the Court to the evidence in the record upon which it relied. Instead, it asserts simply that the evidence "'clearly demonstrates the failure of consideration.'" 100 So. 2d at 803 (quoting brief). Quite properly, the Florida Supreme Court there held that "Such an offhand reference does not properly present for determination by this court the propriety of any ruling the chancellor may have made in this phase of the controversy." *Id.* By contrast, the argument advanced by the petitioner's in this case, when considered together with the detailed statement of the facts below, clearly demonstrated that the trial court had applied the statute at issue to condition access to public records on the speech of the petitioner. The brief demonstrated that the trial court had inquired into why the petitioner sought access to the records and, upon learning that the records would be used to question the accuracy of public statements made by NASCAR officials regarding the cause of Earnhardt's death, decided that the records would not be made available to the petitioner. Petitioner's argument showed that this violated principles established by decisions such as *United Reporting*.

II.

The State Appellate Court Rendered an Unexpected Interpretation of State Law

The *PruneYard* decision also recognized a second, independent basis for recognizing and deciding the First Amendment issues presented by the appellants: the California Supreme Court had surprised the litigants by failing to follow its own state law precedents that had been favorable to the appellants' position. This explained why the appellants had not placed greater emphasis on the

federal grounds before the California Supreme Court – they had had an independent and adequate state law ground for affirming the trial court decision. The *PruneYard* Court observed: "[T]his Court has held federal claims to have been adequately presented even though not raised in lower state courts when the highest state court renders an unexpected interpretation of state law or reverses its prior interpretation." 447 U.S. at 85 n.9 (citing *Brinkerhoff-Faris Trust & Savings Co. v. Hill*, 281 U.S. 673, 677-78 (1930); *Saunders v. Shaw*, 244 U.S. 317, 320 (1917)). The California Supreme Court did that in *PruneYard* by overruling one of its prior decisions that had recognized the state constitutional right relied upon by the appellants.

The Fifth District Court of Appeal also abruptly reversed its interpretation of Florida constitutional law when it held that the statute at issue met the requirements of article I, section 24(c) of the Florida Constitution.[2] In *Halifax Hospital Medical Center v. News-Journal Corp.*, 701 So. 2d 434 (Fla. 5th DCA 1997), the Fifth District expressly had declared unconstitutional under article I, section 24 of the Florida Constitution an exemption to the Florida Public Records Law that suffered from

[2] The Fifth District Court of Appeal of Florida, for purposes of this case, "was shown to be the highest court of the state in which a decision could be had" when the Florida Supreme Court declined to exercise its discretionary jurisdiction. *See Am. Ry. Express Co. v. Levee*, 263 U.S. 19 (1923).

the same type of overbreadth that is found in the statute here for review.[3]

The Florida Supreme Court then affirmed that decision. *Halifax Hospital Medical Center v. News-Journal Corp.*, 724 So. 2d 567, 569 (Fla. 1999). Application of the *Halifax* decision to the facts of this case would have required invalidation of the statute at issue on state constitutional law grounds. *See* R. App. 33-40 & 82-94. Instead of applying *Halifax* or distinguishing it, the trial court, the Fifth District Court of Appeal, and the Florida Supreme Court simply refused to acknowledge the *Halifax* decision. The federal arguments for reversal of the trial court's order were completely unnecessary at the time that petitioner appealed to the Fifth District Court of Appeal and the Florida Supreme Court. Those arguments became

[3] Article I, section 24(a), Florida Constitution, provides: "Every person has the right to inspect or copy any public record made or received in connection with the official business of any public body, officer, or employee of the state, or persons acting on their behalf, except with respect to records exempted pursuant to this section or specifically made confidential by this Constitution." Article I, section 24(c) prohibits enactment of any exemption that is "broader than necessary to accomplish the stated purpose of the law." The exemption at issue in *Halifax* applied both to records that would serve the purpose of the exemption, allowing public hospitals to compete fairly with private hospitals, and those that would not, and was therefore void. The Florida Legislature adopted the exemption applicable to the Earnhardt autopsy photographs to protect the "immediate family members of the deceased" from emotional distress. Ch. 2001-1, § 2, Laws of Fla. The exemption applies not only to new autopsy photographs of persons with living close relatives who might by distressed by public access to the photographs, but also to decades-old, previously public autopsy photographs of persons long deceased who have no living relatives. The exemption therefore should have been declared void under the Florida Constitution, but was not.

necessary only after the Fifth District Court of Appeal refused to follow its own precedent and the Florida Supreme Court refused to review the case. Petitioner nevertheless presented the federal arguments to both the Fifth District Court of Appeal and the Florida Supreme Court as alternatives to its main arguments in order to ensure that those arguments would be preserved. Under the *Prune-Yard* decision, of course, it was not even necessary to do this. The issues are regarded as adequately presented simply because the state appellate courts altered the independent Florida law grounds for a decision for petitioner in ruling on the appeal.

Finally, the Court should consider that some of the arguments raised by the petition are based on this Court's decision in *United States v. American Library Association*, 123 S. Ct. 2297, 2310 (2003), after the Fifth District Court of Appeal had rendered its decision in July 2002. The petitioner had no opportunity to challenge the constitutionality of the statute at issue on the basis of the views expressed by four Justices in *American Library Association* that removal of information from state libraries on the basis of its content must be subjected to strict scrutiny, because the case had not yet been decided. At a minimum, the decision of the Fifth District Court of Appeal should be vacated for reconsideration in light of that decision.

CONCLUSION

The petitioner properly preserved its claims for review by this Court and a writ of certiorari should be granted.

Dated: November 5, 2003

Respectfully submitted,

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